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BY

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AND

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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THE RIGHT HON. SIR SAMUEL EVANS, G.C.B.

[*Contributed by* THE RT. HON. THE LORD CHANCELLOR.]

BUT for the war Sir Samuel Evans would have been remembered as an acute lawyer, a successful politician, and a competent President of the Probate, Divorce, and Admiralty Division. The outbreak of war devolved upon him the duty of deciding the great majority of the cases in prize which were brought in the English Courts. He did not live to complete his task, but the period of his work so nearly coincided with the length of the war that it may justly be claimed for him that the development of prize law during the present war was his work. The extent of that work can only be realised by bearing in mind the variety and extent of the difficulties with which he was confronted in August 1914.

In England no living man had had experience of the working of prize law either as counsel or as judge. There was a new Prize Act, and the rules of procedure had been greatly modified since the Crimean War, when the Court had last sat. During the war many Orders were issued which did not diminish the number of doubtful points that existed, and, above all, the changed conditions of war and commerce since the Napoleonic Wars made the application of many of the old decisions a matter calling for the greatest care and nicest skill. The President grappled with these difficulties and overcame them. He based his work on the principles settled by Lord Stowell during those wars, but at the same time he developed and adapted them so that the law administered by him became a body of living principles applicable to actual conditions. His acuteness of intellect, his great learning and soundness of judgment have placed him for all time in the first rank of the great Judges of Prize.

The occasions on which an appeal against his decision was lodged were not numerous, and the number of successful appeals was

extraordinarily few. The most noteworthy of the latter class was the *Zamora*, but here he had the support of the decision of Lord Stowell in the *Fox*. On the other hand his judgments in cases such as the *Kim* reveal the lucidity and skill with which he could unravel complicated facts, and apply to them principles extracted from cases decided under different conditions of trade.

Most of the cases which came before him were decided on questions of fact, but these, as well as those involving questions of law, clearly show that he maintained to the full the standard of justice which had been fixed at so high a level by Lord Stowell and his predecessors. An honest neutral was fully protected, but the fraudulent or dishonest claimant found that his subterfuges were plain to the judge, and no amount of technicality or complexity could conceal from him the true bearing of the facts.

Although he died before his task was completed, his decisions form a permanent and valuable addition to the principles of international law, and it is confidently predicted that he will occupy a permanent and an illustrious place in the long roll of British judges.

THE LAW OF THE PRIZE COURT.

[*Contributed by* HUGH H. L. BELLOT, ESQ., D.C.L.]

ONCE more it has been judicially affirmed in Germany that the law administered by a Prize Court is not international law, but municipal law. As this doctrine has been adopted by at least one of our leading text-writers, it appears desirable to call more than passing attention to a claim which strikes a deadly blow at the foundations of the fabric of international law. It was held in the *Zaanstroom*[1] by the Hamburg Prize Court that "Prize Courts are national tribunals. They are established by their own States to determine whether the organs of the State carrying on the maritime war have complied with the rules which they have been instructed to follow and to pass on the legal consequences of their acts. From this it follows that the nations have to judge according to the law prescribed by their State, regardless of whether this law is in harmony with existing principles of international law or not. Whether this is so or not, is not the province of the Prize Court to determine, but is left to the belligerent State which is alone responsible in this regard to other States."

We may pause here to examine these propositions. It may be at once admitted that Prize Courts are national tribunals, since they must necessarily derive any powers they possess over their own subjects from their own national government. But they are created not for the purpose of enforcing only national law, but also international law. They exist not merely for the purpose of determining whether the organs of their own State have complied with its municipal regulations, but also for the purpose of determining whether the organs of the enemy or neutral States have complied with the rules of international law. If this were not so, the greater part of the business of the Prize Court would be left to

[1] Cited by Huberich & King, *The Development of German Prize Law*, 1918.

the States concerned to settle by diplomatic methods, a course only resorted to in practice when the Prize Court has failed to deal with the case or the parties are dissatisfied with its decision.

As Lord Parker said in the *Zamora*, "It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court."

This function is nowhere more clearly stated than in the memorable judgment of Lord Stowell in the *Maria* (1799). It was his duty, declared his lordship, "to administer with indifference that justice which the Law of Nations holds out without distinction to independent States, some happening to be neutral and some belligerent. The seat of judicial authority is, indeed, locally here in a belligerent country, according to the known law and practice of nations; but the law itself has no locality."

The same view was taken by American jurists. "The State," says Wheaton, "to which the captors belong, whilst it is thus examining into the conduct of its own members and deciding whether the ships or goods which they have seized are lawfully taken or not, is determining a question between its own members and the foreigners who claim the property; and this controversy did not arise within its own territory, but in the main ocean. The right therefore which it exercises is not civil jurisdiction, and the civil law, which is peculiar to its own territory, is not the law by which it ought to proceed. Neither the place where the controversy arose, nor the parties who are concerned in it, are subject to this law. The only law by which this controversy can be determined is the law of nature, applied to the collective bodies of civil societies, that is, the law of nations." Moreover, if we turn to the commission to the British Prize Court, we find that from the earliest times it was directed to proceed "according to the course of Admiralty and Law of Nations." And in the memorandum presented to the United States by the British Ambassadors, April 24, 1916, the constitution and function of a Prize Court are clearly stated:

" In some matters it is true that the Prize Court is bound by the municipal enactments of its own country. It is the territorial sovereign who sets up the Court, and who therefore determines the matters which are incidental to its establishment. His Majesty's Government have already pointed out that each country determines for itself the procedure which its Prize Courts shall adopt; but certainly under the British system—and His Majesty's Government were under the impression that in this matter the United States had taken the same course—the substantive law which the Court applies as between captor and claimant consists of the rules and principles of international law, and not the municipal legislation of the country."

To return to the judgment in the *Zaanstroom*, the Court absolutely rejected the views sometimes advanced by older authorities (*i.e.* German) that Prize Courts are bound to apply international law, even though the rule in question has not become part of the national law. " Practically it would be impossible to carry out this idea," declared the Court. Why? Because forsooth " in many cases the so-called rule of international law is uncertain and unascertainable. When this is not the case the rule may have ceased to be applicable owing to the attitude of the respective belligerents or to a change in the conditions forming the basis of its application. For example, it cannot be demanded that one belligerent shall continue to be bound, and to require its Prize Courts to apply an international convention which has been violated by the opposing belligerents, although such convention expressly provides that it is to remain in force in the event of war. Furthermore, it requires no detailed argument to demonstrate that certain rules of international customary law have been affected and have become inoperative by reason of new methods of naval warfare, as the submarine warfare."

The argument that because cases exist in which the rule of international law is uncertain or unascertainable, international law itself is non-existent, is a favourite one with persons who are either hostile to its existence or ignorant of its nature and extent.

The other arguments may be dismissed as equally worthless. International law provides for both cases. If one belligerent refuses to be bound by a rule of international law, his opponent is also released, and may either refuse to be bound or may attempt to redress the balance by reprisals. Although difficult questions have

arisen upon the interpretation of treaties in the event of changed conditions, the principle upon which the maxim *Conventio omnis intelligitur rebus sic stantibus* is applied, are well ascertained and recognised in international law.

The citation of submarine warfare as waged by Germany as a reason for the alteration of the law is certainly unfortunate. Germany herself was a party to the rule that a vessel must not be destroyed until those on board have been put in a place of safety. The late Captain Cromie proved in the Baltic that German vessels could be destroyed without loss of life. The German practice has been to destroy regardless of any loss of life which might and probably would ensue. A rule does not cease to be valid because it becomes inconvenient. It can only become invalid when all the parties who made it have agreed to its abrogation. As an example of bad law and worse reasoning this judgment of the Hamburg Prize Court easily takes pre-eminence.

THE CANADIAN CONSTITUTION AND EXTERNAL RELATIONS.

[*Contributed by* PROFESSOR A. BERRIEDALE KEITH.]

IN his latest, and not least important, contribution to the knowledge of the Constitutional Law of Canada [1] Mr. A. H. F. Lefroy pays a high compliment to the framers of the British North America Act, 1867: "However glorious the future of Canada may be," he writes, "it may well be worked out, so far as concerns her internal affairs, upon the basis which the Fathers of Confederation laid." Mr. Lefroy's words, based as they are on an exceptional familiarity with the constitution of the Dominion, are fully justified in the course of his new analysis of the principles which affect the relations of the central and provincial governments of Canada, and which make the federal system of the Dominion almost a model of federal government.[2] If in the course of time the revision of the Canadian constitution becomes necessary, it may safely be assumed that no substantial changes will be demanded in the rules which prescribe the framework of the internal government of the Dominion.

The Growth of Canadian Independence.—But in half a century Canada has grown from a feeble dependency to the stature of a great nation, which claims through its Prime Minister [3] in absolute terms a position of complete equality with the United Kingdom in the Commonwealth of Nations which constitutes the British Empire. The justice of the claim is gladly admitted by the United Kingdom, but the question inevitably presents itself of the degree to which the new status is compatible with the British North America Act and the constitutional relations between Canada and the United

[1] *A Short Treatise on Canadian Constitutional Law.* Toronto, The Carswell Co., Ltd., 1918.

[2] The justification of the description of the Canadian constitution as truly federal is given by Mr. Lefroy, *op. cit.* pp. 157, 158.

[3] Cf. Cd. 9177, pp. 157, 158.

Kingdom. In practice, indeed, the supremacy of the United Kingdom has long ceased to bear heavily on Canada ; just stress is laid by Mr. E. Porritt, in his recent study of the evolution of Canadian politics,[1] on the remarkable generosity with which, since the grant of responsible government, the British government has favoured the growth of Canadian independence. It is well to be reminded [2] that in 1874 the United Kingdom was prepared to see Canada give a preference in her markets to the United States over the mother country, if by doing so she could develop her agriculture, her fisheries, her lumber and coal industries. To Mr. Porritt, indeed, concerned as he is mainly with the actual working of the constitution, the supremacy of the United Kingdom is a thing of the past, surviving as a reality only in the domain of foreign affairs, while even in that sphere Canada has achieved the unfettered right since 1907 of making her own commercial treaties.[3]

In legal theory, however, the position wears another aspect, and in formal expositions of the Canadian constitution, such as Mr. Lefroy's or Mr. W. S. Scott's interesting attempt [4] to explain, for the benefit of " the average student," the history of the Dominion constitution, full recognition is accorded to the principles which mark the subordination of Canada to the United Kingdom. If the royal veto is obsolete, there still remain the territorial limitation of Dominion legislation [5] ; the supremacy of the legislation of the United Kingdom [6] ; the inability of Canada to change save in minor details her constitution [7] ; the right of appeal from her Courts to the Judicial Committee of the Privy Council [8] ; the reservation of the prerogative of honour [9] ; and, last but not least, the concentration in the hands of the Government of the United Kingdom of the sovereign right to declare war, to make peace, to conclude treaties, and to enter into diplomatic relations with other Powers.[10]

[1] *Evolution of the Dominion of Canada.* New York, World Book Co., 1918.
[2] *Op. cit.* pp. 454–6.
[3] *Op. cit.* p. 216.
[4] *The Canadian Constitution Historically Explained.* Toronto, The Carswell Co., Ltd., 1918.
[5] Lefroy, *Canadian Constitutional Law*, pp. 80, 181.
[6] *Ibid.* p. 159.
[7] The Provinces have a general power to do so under s. 92 (1) of the British North America Act.
[8] Lefroy, *op. cit.* pp. 154, 263.
[9] *Ibid.* p. 167.
[10] *Ibid.* p. 174.

The contrast between the legal position of Canada and her practical relations with the United Kingdom raises at once an interesting problem: can the equality of the Dominion with the United Kingdom become real, without legislation, by the traditional British methods of the use of the prerogative and by judicial interpretation, or must much of the British North America Act be formally abrogated as a token of a new era?

The Territorial Limitation of Dominion Legislation.—The Courts and statesmen of Canada have, as was natural, endeavoured to read into the British North America Act principles which would establish the independence for all practical purposes of Canadian legislation. Thus it was at one time contended that the exclusive legislative authority conferred on Canada by s. 91 of the Act was intended to signify a formal renunciation by the Imperial Parliament of the power to legislate for Canada, and, when the untenability of this contention was recognised, it was still contended by the Dominion Government in the bitter controversy over copyright legislation that the Dominion Parliament had the power to repeal or modify any Imperial Act applicable to Canada if passed before the Constitution Act. If this contention also has disappeared of late years, there has been a growing revolt, not confined to Canada, against the territorial limitation of Dominion legislation as given effect to by the Judicial Commitee in the case of *Macleod* v. *Attorney-General for New South Wales*.[1] Mr. Lefroy[2] would ascribe to the Canadian legislatures generally "the same power to bind their own subjects everywhere as the Imperial Parliament has to bind British subjects everywhere," and holds that "it is, furthermore, still a moot question whether colonial statutes, purporting to have an extraterritorial operation, are nevertheless not valid and binding within the territory and upon the Courts of the lawmaker." The Solicitor-General[3] of New Zealand and Mr. Scott[4] also question the validity of the territorial limitation, and the Supreme Courts of Canada and New Zealand[5] have on occasion protested against it. These facts are clear proof that the restriction has ceased to be justifiable, but, with all deference to the opposing current of opinion, it is impossible to accept as valid the efforts to explain away the

[1] [1891] A.C. 455.
[2] *Op. cit.* p. 80.
[3] 33 L.Q.R. 117.
[4] *Op. cit.* pp. 9–14.
[5] See *Journ. Soc. Comp. Leg.* ix. 207 *seq.*

Macleod case. In it the Judicial Committee denied the right of the Parliament of New South Wales to impose a penalty on the commission of bigamy in Missouri in 1889 by a man who had married in the colony in 1872. In view of the fact that under s. 57 of the Act 24 & 25 Vict., c. 100, the English Courts could have punished an act of bigamy committed outside England by any British subject, the decision of the Judicial Committee can only be explained on the ground that they held that the power of a colonial legislature was less than that of the Parliament of the United Kingdom. Nor is there any doubt that this is the interpretation which has been given to the decision by the lawyers who have framed the criminal statutes of the Dominions. Canada,[1] indeed, makes criminal an act of bigamy committed outside Canada by a British subject resident in Canada, but only if such a person "leaves Canada with intent to go through such form of marriage," and, though the Supreme Court of Canada has not adopted this as the *ratio decidendi* in such cases,[2] nevertheless it is plain that the proviso saves the validity of the enactment. Nor does the case of *Attorney-General for Canada* v. *Cain*[3] overthrow the principle of limitation, for it concedes merely the right to use such measure of extraterritorial constraint as is requisite for the effective exercise of the right to expel from the Dominion a prohibited immigrant. Still less cogent is the argument of Mr. Scott[4] that there must be power to control the army and navy of Canada when beyond the limits of the Dominion. The case of the military forces of Canada is provided for expressly by the Army Act, while that of the naval forces was legislated for by the Imperial Parliament in the Act of 1911,[5] precisely on the ground that unless such legislation were passed, the power of Canada to regulate her naval forces outside Dominion limits might at any time be pronounced lacking. The position of merchant shipping is not less unsatisfactory, and the case for the removal of territorial restriction is plainly unanswerable. Equally clear is the necessity for the formal abrogation of the supremacy of Imperial legislation, if the doctrine of equality of status is to be made a reality. Nor can judicial interpretation avail to enable Canada to alter her own constitution, and national dignity forbids the continuance of recourse

[1] *Revised Statutes*, 1906, c. 146, s. 275.
[2] *In re Criminal Code Sections relating to Bigamy*, 27 S.C.R. 461.
[3] [1906] A.C. 542. [4] *Op. cit.* p. 13. [5] Cd. 6091, p. 14.

to the Imperial Parliament for that purpose, while the time is plainly ripe for the formal abolition of the royal veto over Dominion legislation.

The Appeal to the Privy Council.—These changes, which are an integral part of the new status desired by the Dominion, carry with them the disappearance of the control exercised by the Judicial Committee of the Privy Council as at present constituted. It is no longer possible seriously to maintain that the judges of the Dominion, to whose high character Mr. Porritt [1] pays a deserved compliment, cannot be trusted to deal impartially with cases between the Dominion and the Provinces or the Provinces *inter se*, and with the abolition of the supremacy of Imperial legislation the necessity of an Imperial Court to make it effective will disappear. But there is much on sentimental grounds to be said for the ideal of Mr. Joseph Chamberlain, which found so eloquent a champion in the Prime Minister of the Commonwealth at the last Imperial War Conference,[2] when Mr. Hughes pleaded for the ideal of a single final Court of Appeal for all the parts of the Empire, recruited from the best legal talent throughout the Empire. It would, however, be idle to deny the difficulties in the way of the consummation of this idea, the dislike of the English bar to any change affecting the constitution of the final Court of Appeal, and the objection of oversea litigants to carrying their cases to a distant tribunal. Unless, however, effect can be given to this proposal, the abolition of the appeal to the Judicial Committee from the Dominions is merely a matter of time. Canada has already purported to abolish it in criminal matters,[3] and, though the effort cannot be deemed valid in view of its repugnancy to the provisions of the Judicial Committee Act, 1844,[4] it is significant that the Judicial Committee has not thought fit to grant leave to appeal in such cases from Canada, and Sir Robert Borden has expressed the view that in civil cases appeal lies too easily from the Dominion Courts.

Titles of Honour.—While these questions have their origin in the fundamental legal relations between the United Kingdom and the colonies, the prominence recently assumed by the question

[1] *Evolution of the Dominion of Canada*, pp. 499, 500.
[2] Cd. 9177, pp. 134–53, 202–11, 243, 244.
[3] *Revised Statutes*, 1906, c. 146, s. 1025.
[4] Keith, *Imperial Unity and the Dominions*, pp. 368–70.

of the use of the prerogative of honour is due to an unhappy attempt on the part of the Government of the United Kingdom to create in the Dominions the social distinctions of the United Kingdom by the establishment of families bearing hereditary titles of honour, in defiance of the democratic sentiment of the oversea communities which accepts with some hesitation even the grant of knighthoods for public services. The baronetcy conferred on Sir Joseph Ward in 1911 was made the basis of a proposal in New Zealand to abolish hereditary titles; unfortunately the warning was disregarded, and in 1917, in the picturesque language of Mr. Porritt,[1] "after a baronetcy had been conferred on a resident at Toronto, long prominent as a dealer in hog products on a vast scale, and a peerage had also been bestowed on the owner of a newspaper published in Montreal, the agitation against titles, begun in the House of Commons in 1914, extended itself east and west from Ottawa." Though these appointments must have had the approval of Sir Robert Borden's Government, the response of the administration to the will of the House of Commons and the people was rapid and effective. A defeat of the Government in Parliament was avoided by the adoption of a minute of Council of March 25, 1918, which deals in an extremely bold and effective manner with the question of honours. It demands "that no hereditary title of honour shall hereafter be conferred upon a subject of His Majesty ordinarily resident in Canada," and "that appropriate action shall be taken, whether by legislation or otherwise, to provide that after a prescribed period no title of honour held by a subject of His Majesty, now or hereafter ordinarily resident in Canada, shall be recognised as having hereditary effect." The minute further deals with other honours and requires that "no honour or titular distinction (saving those granted in recognition of military service during the present war or ordinarily bestowed by the sovereign *proprio motu*) shall be conferred upon a subject of His Majesty ordinarily resident in Canada except with the approval or upon the advice of the Prime Minister of Canada." The personal position of the sovereign is thus respected, and the imperial character of honours is preserved by the further provision that the determination of the character and number of titles or honours to be allocated to Canada from time to time shall remain in the hands of the Government of the United Kingdom. The justice and propriety of the

[1] *Evolution of the Dominion of Canada*, p. 367.

Canadian demands is obvious, and Sir Wilfrid Laurier has gone even further in suggesting that any title whatever is inconsistent with the true spirit of democracy, a view which is that of the Labour party of the Commonwealth.

Foreign Relations.—More complicated is the question of foreign relations, though tentative solutions have already been brought forward. The problem greatly exercised the Government of Sir Wilfrid Laurier, and a substantial gain was claimed when in 1907 negotiations for a new commercial treaty with France were entrusted to Canadian Ministers only, though the agreement finally arrived at was signed jointly by them and by His Majesty's representative. This procedure, however, though it had the advantage of regularity and simplicity, proved unsatisfactory to Canada: not only had the Dominion ministers to receive from the Imperial Government authority to negotiate, but the treaty arranged was subject to ratification, a process involving the assent of the Imperial Ministry. Sir Wilfrid Laurier therefore in 1910–11 developed a new method of procedure, that of direct negotiation with consular representatives of foreign Powers at Ottawa, followed by legislative action, without the conclusion of any formal treaty through diplomatic channels. The success thus achieved in earlier negotiotions with Germany [1] and Italy led to the famous agreement of January 21, 1911,[2] between the Canadian Ministers, the Hon. W. S. Fielding and W. Paterson, and the United States Secretary of State for reciprocity in trade relations, which led in the course of the year to the downfall of the Laurier administration and the abandonment for the time being of the constitutional experiment.

Representation at International Conferences.—A new and important departure, however, was made at the instance of the Imperial Government itself in 1912–14 on the occasion of the important international conferences on Radiotelegraphy [3] and Safety of Life at Sea.[4] At similar conferences in the past the United Kingdom had been represented by one delegation only, but on these occasions, for the first time, special delegates represented Canada, under full powers given to them by the King to represent him in respect of the Dominion, standing on a footing of absolute equality with the delegates invested with full powers

[1] Porritt, *op. cit.* pp. 442–6.
[2] Cd. 5523, pp. 5–11.
[3] Cd. 6873.
[4] See 4 & 5 Geo. V., c. 50, Schedule I.

for the United Kingdom. The constitutional significance of this decision has largely been ignored: yet it affords an immediate and undeniable example of the recognition by the contracting powers at these conferences, which included all the great Powers, of the separate international status of Canada. It is impossible to argue that the conferences in question dealt with non-political questions, save by an undue limitation of the meaning of the expression "political." From the point of view of the Dominion the recognition of its autonomy was as complete as it could be, short of the recognition of its independence: the Imperial Government's intervention was confined to the advice tendered to the Crown to grant full powers and to ratify the conventions when the Dominion Governments expressed their desire that they should be ratified. Nor can it be supposed that, in the event of disagreement as to the wisdom of ratification, the Imperial Government would have refused to carry out the wishes of the Dominion in the matter.

International Status.—The importance of these precedents is obvious, for they suggest the means by which at political Conferences, whether on peace terms or otherwise, the Dominion may be secured its due international position. It is idle to imagine that, if this position is not secured, Canada will consent to remain a part of the Empire. If it is borne in mind that Canada furnished a larger army for the war than Serbia, Greece, Rumania, Montenegro or even Belgium, and that its losses were larger than those of the United States,[1] it is plain that a suggestion that its claim to separate representation is barred by its colonial status must be treated as wholly inadmissible. The only alternative policy which is open is the inclusion of Dominion representatives in the British delegation considered as a unit; but, though this course of action has been deemed advisable for the Peace Conference, it is plain that it affords no satisfactory settlement of the question as a whole. It is impossible on the panel system to secure adequate representation of the Dominions on the British delegation, and, while this defect is remedied in the case of matters specially affecting the Dominions by according them special representation on these occasions, the value of this concession is counteracted by the refusal to allow voting power to the Dominion delegations, which are thus placed on a lower status than the minor foreign States. The spirit of

[1] Cf. the Halifax *Herald*, cited in *The Times*, December 6, 1918, p. 7.

national self-consciousness cannot be satisfied in the ultimate issue by anything short of a definite international status.

Diplomatic Representation.—From the recognition, however, of these facts other consequences follow: it will be impossible to deny to the Dominion the right of separate diplomatic representation abroad and of receiving diplomatic representatives of foreign States. Sir Wilfrid Laurier, indeed, admitted that the status of the chief consular officers of foreign Powers in Canada was gradually assuming a quasi-diplomatic aspect. Obviously much room remains for adjustments with the Government of the United Kingdom to avoid needless duplication of agents, but the point of principle must certainly be conceded, and there is nothing but advantage to be derived from replacing by duly accredited representatives the quasi-commercial agents who at one time represented Canadian interests in Europe. Nor is Canada unprepared to undertake control of her external affairs: for this purpose she has established the Department of External Affairs at first under the Secretary of State, and since 1912 under the personal control of the Prime Minister,[1] and the International Joint Commission of the United States and Canada which under the Boundary Waters treaty of January 11, 1909,[2] forms a standing Court for the solution of disputes between the United States and the Dominion, is composed on the British side of nominees of the Dominion Government.

Declaration of War.—One problem remains, that of the declaration of war, and its solution will be simplified in large measure if the project of a League of Nations bears any fruit, since the risk of disagreement between the United Kingdom and the Dominions in this regard will thus be reduced to vanishing point. But in any event the relation of the United Kingdom and the Dominions can ultimately be based only on the principle that no part of the Empire shall declare war, save in case of external aggression, without previous communication with the rest of the Empire, and that every effort shall be made by constant communication on diplomatic questions to secure harmony of views in international issues. A first step of value to achieve this end has already been taken in the establishment of the practice of direct communication between the Prime Ministers of the Empire,[3] which in time of peace must be developed and extended so that, while the autonomy of each unity

[1] Cd. 6863, p. 16. [2] Cd. 5223. [3] Cd. 9177, pp. 155–65.

is fully safeguarded, common action in international matters may supersede the illogical system under which great communities permitted their foreign affairs to be controlled by the Government of the United Kingdom, and even, as did Sir Wilfrid Laurier at the Imperial Conference of 1911, deprecated the suggestion that the United Kingdom should be bound to consult them on all international questions.

The development of constitutional relations for Canada and the other Dominions and for India on this basis must, it is clear, be gradual and not without complication. No alternative course is, however, within the bounds of practicability, since the Dominion Governments have ruled out any proposal which diminishes Dominion autonomy,[1] and since, on the other hand, the demand for independence for the Dominions has substantial support only among a section of the Dutch population of the Union of South Africa, and runs counter to that deep sense of unity which has revealed itself so remarkably in the course of the war.[2]

[1] Cd. 8566, pp. 40–61.

[2] Mr. Lefroy's work is dedicated to the memory of his son, "who willingly gave his life for Canada and the Empire" on April 7, 1917.

[Since the above article was in type Mr. Lefroy died suddenly in Toronto on March 8th. The Society has lost in him a valued friend of many years' standing and a regular contributor to the Review of Legislation.—ED.]

CHANGES IN THE CONCEPTION OF NEUTRALITY.

[*Contributed by* R. F. Roxburgh, Esq.]

An attempt has been made in this article to trace in outline the development of the conception of neutrality, with particular reference to the changes which it has undergone during the present war.

Neutrality in Antiquity.—It was comparatively late in the growth of the law of nations that neutrality was first recognised as a possible attitude of states; still later that it came to be regarded as a conception involving rights and duties. In antiquity it was unknown; and by the time that the peaceful relations of states had become the subject of elaborate rule, and the severity of war, as between belligerents, was to some extent mitigated by custom, neither neutrality, nor any laws of neutrality, had yet secured recognition.[1]

The Gradual Development of Neutrality as a possible Attitude during the Sixteenth Century.—The conception gradually developed during the sixteenth century; treaties were concluded under which each party agreed not to assist an enemy of the other in case of war; and the Swiss Confederation, by its policy of holding aloof from wars between neighbouring states, afforded a constant example of neutrality in practice, however imperfect it may have been according to modern notions.[2] Once the general principle was admitted, the detailed rules began to be fashioned by the jealousy of belligerents, who strove to prevent neutrals from assisting their opponents, and by the pressure of neutrals, who resented interference with their peace-time habits of trade and intercourse.[3]

[1] Hall, *International Law*, 7th ed. § 19, p. 72; Oppenheim, *International Law*, 2nd ed., vol. ii. p. 347. Geffken in Holtzendorff, iv. p. 614, quoted by Oppenheim, *op cit.* vol. ii. p. 348, gives examples of unsuccessful attempts on the part of states to secure recognition of their neutral attitude from belligerents.

[2] Oppenheim, *op. cit.* vol. ii. p. 348.

[3] Cp. Hall, *op. cit.* § 19, p. 72.

Grotius and the Seventeenth Century. — But their growth was slow. Grotius did not know, or at any rate did not use the term "neutrality," and in a meagre chapter entitled "De his qui in bello medii sunt" established only two doubtful rules.[1] This shows that, although the possibility of a state taking neither side was admitted, the rules of conduct necessary to preserve such an attitude had not been worked out. Indeed, for a long time to come, the impartiality of neutrals was not real impartiality, and the licence of belligerents was, in general, restrained only by immediate fear of war.[2]

The Eighteenth Century. — During the eighteenth century, however, opinion began to mature,[3] and Bynkershoek and Vattel, for example, had adequate conceptions of neutrality. In this ripening of thought the conviction that a state, if neutral, should not give active assistance to either belligerent was first established, and later came the realisation that a neutral should not be passive in permitting its citizens to give aid to either belligerent through acts over which it was supposed to have control.[4]

Though neither the influence of contemporary thought, travelling in this direction, nor the ethical view of the general relations of states to each other commonly taken by writers, was strong enough at that time to secure the establishment of an adequate or consistent state practice, these factors were preparing the way for a rapid development later, by giving currency to a few general principles which were capable of application to the actual relations of belligerents and neutrals.[5]

The First Armed Neutrality may be regarded as the earliest organised attempt by a group of neutral Powers to extort from belligerents in the name of neutrality greater security for their maritime commerce. Its avowed purpose was to establish, "by the united endeavours of all neutral maritime powers, a neutral system, founded on justice, . . . in favour of the trade of neutral nations." This attempt and a second attempt, made by the Baltic Powers in 1800, were unsuccessful; international conditions were unfavourable in Europe.

[1] *Lib.* III. c. 17.
[2] See Oppenheim, *op. cit.* vol. ii. p. 350, and Hall, *op. cit.* § 209, p. 621 for examples.
[3] Hall, *op. cit.* § 210, p. 623.
[4] *Ibid.*, § 21, p. 74.
[5] Cp. *ibid.*, § 210, p. 623.

The United States and Neutrality, 1793–1818. — It was the attitude of the United States, during the years 1793–1818, that marked the next step in the evolution of neutral rights and duties. After the French Republic had been proclaimed in 1792, Genêt, an enthusiastic patriot trained in the French Foreign Office under Vergennes, was sent as Minister to the United States, to secure American sympathy and support; on his arrival at Charleston in April 1793, he at once began to organise operations against the enemies of France. During the weeks which had to elapse before he could reach the capital, divergent policies, based upon conflicting sympathies, were proposed in the American Cabinet. The final decision rested with Washington, and his first step was, on April 22, to issue a Proclamation of Neutrality, announcing a "conduct friendly and impartial towards the belligerent Powers."

The resulting diplomatic conflicts between Jefferson, who was determined to uphold this Proclamation, and Genêt, who was resolved to evade it, the dispute with England over the rights of neutral maritime trade, and the eventual outbreak of war in 1812, attributed by an American historian to "the national anger roused by twenty years' disregard of our neutral rights," [1] secured a rapid development of the laws of neutrality. Moreover, a determination to stand aside from European quarrels, of which Washington's Proclamation was the first public announcement, became the most characteristic feature of American diplomacy,[2] and in this way the conception of neutrality acquired important diplomatic and political significance on the American Continent.

Neutrality in Europe after the Napoleonic Wars.—Neutrality likewise received an extended application in Europe after the close of the Napoleonic Wars. Among the devices designed at that period to lessen the peril of future wars was the permanent neutralisation of small states wedged between Great Powers. The phrase "neutralisation" also came to be applied to certain arrangements made by convention with regard to various international waters Although it is a legal solecism to confound "neutralisation" and "neutrality," the similarity of the terms has an undoubted historical justification, and led to much confusion in public thought.

[1] Fish, *American Diplomacy*, New York, 1916, p. 175.
[2] *Ibid.* p. 101.

Moreover, one of the ideas underlying the resettlement of Europe at the Congress of Vienna, and pervading the diplomatic atmosphere long afterwards, was that, if wars could not be prevented, they might at least be localised, by making neutrality easy and belligerency difficult. The course of the wars of the nineteenth century strengthened this idea. The Crimean War was in fact localised; the American Civil War did not involve any European Powers; and the wars of 1870 and 1898, the Boer War and the Russo-Japanese War were each confined to two or three belligerents. In all of them, moreover, the political power of the neutral states was relatively great, and any attempt by a belligerent to interpret a doubtful rule to the detriment of a neutral was found to be politically costly. The experience of these wars tended to convince European statesmen that, in practice, belligerents were bound by political expediency to acquiesce in neutral claims, and that, as doubtful points in the law were settled, neutral rights would be enlarged.

The Growth of International Trade and Finance.—But if the wars of the century after 1815 enhanced the prestige of neutrality, the comparatively long periods of peace contributed still more to its advancement. International trade developed rapidly, and an international system of finance was established. World war was thought to be unlikely, or even impossible, in the face of probable financial and commercial ruin. The progressive application of science to the instruments of warfare, increasing its terrors and enlarging its scope, was likewise expected to operate as a deterrent factor. Thus neutrality as a maxim of state policy seemed to possess high ethical quality when contrasted with the horrors of war, and to embody a sound national policy in regard to commerce and finance. Such a policy, it was thought, if consistently pursued, might even lead to permanent peace.[1]

An Erroneous Theory of Neutral Rights and Duties became Prevalent.—During these periods of peace, the historical background of neutrality was sometimes forgotten. It had not made its first appearance in international law as a legal conception from which rights and duties were deduced in scientific order and arrangement, but as a possible attitude for a state when confronted by war between its neighbours. When it had been recognised as possible and legiti-

[1] See, for example, Lawrence, *Principles of International Law*, 4th ed., p. 587.

mate, belligerents acquired the habit of demanding certain lines of conduct from such a neutral state in return for respecting its neutrality, and usages grew up as to the limitations under which it might continue to trade. These usages developed into rules of customary law by the process common to all such rules, acquiring the force of law only when states began to conform with them under the conviction that they were legally bound to do so. Their form was moulded by a long series of conflicts and compromises, determined primarily by reference to the relative political power of the contending parties, though under the influence of the dominant principles and personalities of the time.

But during the years preceding the present war, greater attention was apt to be devoted to the supposed legal attributes and characteristics of neutrality, from which detailed rules for conduct were thought to be capable of deduction. Now rules which are reached by this process must in practice conflict with a parallel series of rules arrived at by reference to the supposed rights of belligerents; and, as it is impossible to settle on any legal basis precedence between conflicting rights, the necessary adjustments must be governed by the moral and political considerations prevailing at the time, and by the supposed interests of states in a future which cannot be foreseen.

The International Conferences at the Hague and in London.—In such an atmosphere, the Powers met in Conference at the Hague in 1899 and 1907, to advance the cause of international peace and the development of all branches of international law, and in London during the winter of 1908–9 to remove some of the uncertainties and reconcile some divergent practices in maritime law. The code of rules which resulted from the deliberations of this Conference met with vigorous opposition in England, and remained unratified when the war broke out.

Neutrality and the Present War.—In twelve days, in the summer of 1914, the political and ethical trappings which had been thrown round the conception of neutrality during the nineteenth century were torn away from it throughout the greater part of Europe. Neutrality had not after all led to the goal of permanent peace. War, in spite of its horrors, now seemed desirable in the eyes of the Central Powers, and inevitable in the judgment of the Allied peoples. Germany was prepared to bear commercial and financial loss in the

hope of ultimate gain ; the Allies were prepared to bear it to avert still greater ruin. In the face of the German onset, neutrality froze the heart. " Sooner than be a silent witness, which means in effect a willing accomplice, to this tragic triumph of force over law, and of brutality over freedom, I would see this country of ours blotted out of the pages of history." [1]

It soon became apparent that this war, unlike those of the immediately preceding period, could not be localised. Access to the supplies of money, munitions, and raw materials which could be drawn from neutral countries was soon seen to be a vital and perhaps the determining factor in the struggle. Under these circumstances, each group of belligerents, realising the inestimable value of neutral sympathy and support, resorted to a systematic propaganda, by pictures, pamphlets, and in the press, designed to minimise the resentment felt by neutrals against the measures which they had adopted, to arouse indignation against those of their adversaries, and to proclaim their cause. There was, in fact, a well-conducted campaign in neutral countries against neutrality of thought.

Reprisals and the Sanction of the Laws of Neutrality.—The neutral Governments, aware of the danger of being themselves drawn into the war, if they should favour either group, strove hard to fulfil the obligations imposed upon them by international law ; but they were, in the earlier stages of the war, not in a position to do more than protest against the illegal acts to which Germany resorted from the beginning. In wars in general, belligerents are restrained from violating the admitted law of nations by fear of bringing neutral Powers into the war against them ; but in the present war this sanction of the law seemed to be wanting, and, as a result, the belligerents resorted to reprisals against one another. In this process, the Allies were scrupulously careful of the lives of neutrals, but Germany undertook a campaign against their ships and subjects, and thereby, contrary to her calculations, brought the United States into the war. The sanction of the law was after all stronger than had appeared.

Moreover, under the stress of war, the rules for belligerent and neutral conduct which had been evolved by International Con-

[1] Mr. Asquith at the Guildhall, September 4, 1914.

ferences to meet different conditions of warfare proved to be inadequate and ill-adapted; and the Allied Powers, so far as they were not contractually bound by conventions, fell back upon the admitted and historic rules of the laws of nations, which appeared to them to be more suitable to the actual conditions of warfare and capable of adaptation to modern requirements.

Thus the legal fabric, built up with so much care during the last fifty years, has indeed collapsed; and there are those who share the view of the late Lord Parker that "the labour which we have expended at many of the Hague Conventions, in formulating such documents as the unratified Declaration of London, has for the most part been labour thrown away." [1] But there is good ground for hoping that this is not the case.

The collapse is primarily due to the number and strength of the parties to this war, and the consequent weakness of the neutral Powers; secondly, to the great miscalculation of the German Government, which from the outset adopted a policy of deliberate lawlessness in the false hope of escaping the consequences, and thereby provoked reprisals by the Allies. The law-making treaties of the nineteenth and early twentieth centuries would almost certainly have stood the test of an ordinary war in which only a few states were parties; and in any case they have paved the way for international legislation in the future. It is true, however, that the events of the war have directed attention to the imperfect sanction of these rules, and to the fact that, as the law of neutrality stands to-day, states, though possessing the right to intervene when the law is broken, are under no obligation to do so. Moreover, experience has shown the difficulty of providing by international convention for the regulation of wars which will be waged under unknown conditions and circumstances.

Neutrality as a Policy. — Neutrality as a maxim of foreign policy has lost its former ascendency. This is due in part to the mere fact that so many peoples have felt it their duty to bear their share in the war. A view is now prevalent that the neutral "shirks his share of the burden of humanity." [2] It may also be attributed partly to a realisation that modern war inflicts such hardships on neutrals as to make their condition hardly more tolerable than

[1] Speech in the House of Lords, *Hansard*, vol. xxix. p. 503.

[2] Lord Parker in the speech already quoted.

that of states at war, while the increased value of neutral support to belligerents, and the greater efforts which are made to obtain it, make a policy of neutrality difficult to sustain. But, apart from these considerations, it has been seen that the danger of war is not necessarily minimised by making neutrality easy, and that a state may be encouraged to embark upon a war by a belief that its neighbours will stand aloof; the policy of neutrality has given place to the programme of a League of Nations. The advocates of such a League propose that if one member wrongs another, all should combine to punish the offender, and the more sanguine hope that wars waged apart from the League will be few. How far these hopes may be justified, only the future can show.

THE GERMAN COLONIES OF AFRICA.[1]

[*Contributed by* Sir Albert Gray, K.C.B., K.C.]

The questions awaiting decision by the Peace Conference are many, varying in importance and complexity. In Europe new states have to be created, and new provinces added to existing states. Here the root-principle is self-determination, which is comparatively easy to apply in the case of large and homogeneous populations. In the case of provinces or districts inhabited by the waifs and strays of diverse nationalities, difficult problems arise. Outside Europe self-determination can hardly be applied, partly because the population is not accustomed to express its wishes by plebiscite, and partly because the tribal units have not as yet any national cohesion.

The German colonies form a case by themselves, and their future is a question of momentous importance to the world at large, involving the peace of the Pacific on the one hand, and of the continent of Africa on the other. During the war their seizure has been regarded as a necessary though subsidiary aim, by ourselves and the Dominions, and by our Allies France and Japan. They are now in our hands, and it remains for us at the Conference to deal with them as we may think fit.

The objects of Germany in founding a colonial empire were in part commercial, the procurement of raw produce, and partly political, viz. the establishment of naval bases as a step towards world dominion; so the judgment of the Conference must take special note of the political object, and considerations on this head may outweigh any founded on self-determination. Yet our Govern-

[1] (*a*) *German Colonies: a Plea for the Native Races*, by Sir Hugh Clifford, K.C.M.G., Governor of the Gold Coast (John Murray, 1918); (*b*) Report on the Natives of South-West Africa, and their treatment by Germany, [Cd. 9146] 1918; (*c*) Correspondence relating to the wishes of the Natives of the German Colonies as to their future Government, [Cd. 9210] 1918.

ment has been wise in using all the means in its power to obtain the views of the natives of the several German colonies as to their future government, and the correspondence on the subject is now published as a White Paper [Cd. 9210]. It is an illuminating document, and cannot fail to carry conviction to all reasonable minds. For be it remembered that all the natives whose views are stated were expressly warned that the conquest in war was not final, and they thus gave their answers fully conscious of what their future fate would be in case of a retrocession to their former masters.

Before any further reference is made to this paper, it may be well to turn to an opportunely published little book on the German colonies by Sir Hugh Clifford, the very capable and experienced Governor of the Gold Coast. Compressed into 116 short pages, it adds one more to the many excellent text-books on the government of subject races. He has rightly understood that in order to appreciate the colossal failure of Germany it is necessary to be equipped with a knowledge of the history of Protectorate administration, and of the relations of white and coloured races which have brought it into being. He goes no further back than the discoveries of Vasco da Gama and Columbus, but it is far enough. The treatment of the coloured man as an inferior being was the natural consequence of domination. So long as the Moors held their ground in Spain, they were hated as aliens in race and faith, but otherwise treated as equals. So long as the British were mere traders in India, we negotiated with the natives on terms of equality, to some extent of subserviency. The expulsion of the Moors from Spain, the irruption of the Portuguese into India, and the Spanish conquest of Mexico and Peru, exercised a deteriorating influence on the dominant races, and religious bigotry denied Christian charity towards the subject peoples. The bad influence was seen to some extent in the earlier days of British dominion in India and is still to be observed in the supercilious conduct of young and inexperienced Englishmen. The nation, however, very soon laid down the principles on which our rule was to be established; the territories were to be governed in the interests of the people, and the administrative officers were to be responsible to the law.

British Colonisation Methods.—This strict amenability to law has been upheld in all British Courts and in all parts of the Empire. It is, however, only one phase of a just rule: another is the estab-

lishment of Courts of Justice and a code of law, one of the first concerns of administrators on an acquisition of territory. The law so established by England is not merely the law which we think suitable; native law and custom are respected so far as not inconsistent with justice. A recent volume of the East Africa Law Reports, edited by Mr. Justice Hamilton, provides an admirable example. It contains notes of cases, civil and criminal, decided in the Protectorate Courts, in which Europeans, Arabs, Hindus and natives are parties, and in which the same meticulous consideration is given to the rights and obligations of all, irrespective of race, colour, or creed. The protective rule over African races founded on these principles and practised with integrity has not failed, on the contrary has been admitted by all the world (outside Germany) to be a conspicuous success, and although in some departments, *e.g.* that relating to alcoholic liquor, some laxity has existed, a scheme of Government had been evolved under which commerce flourishes and peace and contentment prevail. The French colonies are also well administered, though by somewhat different methods. With these examples before their eyes, the Germans appeared on the African scene.

The Berlin Act.—In the case of the German colonies of Africa, the flag went first and trade was expected to follow. There was practically no German trade to justify a protectorate when in the years 1880–84 the German flag was raised in Togoland, the Cameroons, and South-West Africa. Thus had Germany a clean slate when she convened the Congress of Berlin, at which was formulated under her presidency the celebrated "Berlin Act" of 1885. That Act was expressed to impose on the contracting Powers the sacred duty of preserving the aboriginal races of Africa, of watching over their interests, of cultivating their moral and material advancement and development. Noble sentiments, as were those of Joseph Surface. It might indeed be thought that Germany, hitherto an onlooker, had discovered serious flaws in British and French methods of rule, and was ready with a new and more effective system of benevolent government, which she was prepared to put into practice for others' guidance. But in fact the engagements of the Berlin Act meant nothing to the German people. The colonial projects were started by the Colonial Society, the forerunners of the Pan-Germanists, against the better judgment of Bismarck himself, solely for the purpose of extending German power, and without

any serious contemplation of problems of government or any sympathetic regard for the native races. It was open to Germany to choose one of two systems, the English under which subject lands are ruled for the benefit of their inhabitants, or the Dutch under which they are regarded as an estate to be worked for the profit of the governing Power. Germany chose the latter, without observance of the humane side of Holland's despotic rule : in fact, she rejected all precedent, an organ of the Colonial party proclaiming that " Germany has nothing to learn from England or any other colonising nation, having a method of handling social problems peculiar to the German spirit."

German Criminal Procedure.—In course of time we shall probably get from our officers who have taken over charge in the Cameroons, Togoland and German East Africa some further account of the methods of German Government. It may be asked what instructions were from time to time given to the Governors for carrying into practice the purposes of the Berlin Act, what Courts of justice were established, and what law was administered for the protection of the natives as between themselves, and between themselves and the white man. Sir Hugh Clifford gives us the answer to the latter questions :

> The only criminal codes promulgated in these territories were made by express provision to apply exclusively to their European population. As regards the natives, who of course formed the vast majority of her colonial subjects, no definition of offences was ever attempted, it being left to the judgment of each individual German official to decide for himself, firstly, what in his opinion constituted an offence, and secondly the nature and extent of its appropriate punishment.

It is notorious that the use of torture was freely resorted to by the German officials, as indeed is implied in a decree of the Imperial Chancellor of 1896, which prohibits " any measures for the purpose of obtaining confessions or declarations other than those allowed by the German Rules of Court." The decree contains another provision, indicative of a low standard of justice : " The infliction of unusual punishments, *particularly in cases of suspected guilt,* is likewise prohibited." The lash was the usual and regular mode of punishment, being economical in the saving of prison accommodation. Sir Hugh relates that on the capture of Lome, the capital

of Togoland, official whips were found in all the officers' houses, and "neatly trussed bundles" of them kept ready for issue at the public works stores. The Government required a record of the punishments inflicted, but notes of evidence were not insisted upon, nor was any form of trial prescribed; and the public were excluded from the hearing of cases. With our experience of German conduct in the war, we can readily imagine the character of the justice administered by German officers in remote Africa.

Forced Labour. — The Germans, having adopted the system of exploiting African territory as an estate for their own profit, soon found themselves up against native *insouciance*, and resorted to forced labour. The African negro tribes have been accustomed to impose upon themselves a communal duty of maintaining the roads which connect them with the world around them, otherwise individuals are content to work each his own patch of soil. As Sir Hugh Clifford says:

> They have no great desire to see the work of development pushed forward upon European lines, though they are quick enough to profit by the new facilities afforded to them. Their preoccupation is to supply their actual wants at the cost of a minimum of toil; to lead the life to which they are accustomed with as little interference as possible; and to confine their public industry to such forms of communal labour as have the sanction of their tribal customs. To compel them to toil on public works, or in mines or on plantations, is to upset the entire scheme of their existence.

Their indolence does not indeed prevent them from seeking well-paid employment at considerable distances from their homes in British colonies, where they are free to return to their homes on the expiration of their agreed term of service. They bitterly resented the German *corvée*; in Togoland they transferred themselves and their families to remote parts of the colony where they might be free from the press-gang, while large numbers emigrated to the adjacent British territory. Thus the labour difficulty increased, and the burden on the remaining population became more heavy. We are not surprised to find that in the three German colonies mentioned the British officers appointed to collect native opinion were met on all sides with bitter complaints against forced labour. "We paid tax 6*s*. a head, besides which we had to work very hard for them. The Germans made us make roads, and then

imposed a tax upon us. They ordered us to work for two weeks if you don't pay the tax." So said one chief: another observed, "The Germans left no good hair on our heads." "The Germans used to flog us so foolishly (*i.e.* aimlessly): when the English came, we did not see this again, and that is what we like." "We want some one who will look after our people." "We all want to be under the English rule." Such is the general tenor of the replies from all the colonies. The least adverse answers come from some parts of German East Africa, where the stress of war has pressed heavily on the natives, and they have been apt to exclaim "A plague on both your houses." One of the chiefs with fatalist leanings quoted the native proverb, "When elephants fight, it is the grass that suffers." Many complained of the torture and floggings, of the exactions and extortions. On the other hand, some chiefs who had been allowed by the Germans to rule in their own fashion stated their acquiescence in or preference for German methods. One gave as his reason "because you could rule your people as you wished. You could beat your wife or child as you wished: if they went to the Germans and complained they were turned away and perhaps beaten." The wife and child might well take a different view.

Expropriation of Tribal Lands.—An additional grievance in many districts was the expropriation of tribal lands for the formation of the German plantations, on which the former occupants were then forced to work. The Germans had no compunction either in Togoland, where the land was taken for plantations, or in South-West Africa, where the grazing lands were seized. Dr. Paul Rohrbach, the candid exponent of German colonial policy, had evidently forgotten the dictates of the Berlin Act when he wrote: "The decision to colonise in South-West Africa could after all mean nothing else but this, namely, that the native tribes would have to give up their lands on which they had previously grazed their stock in order that the white man might have the land for the grazing of his stock." The expression of views such as these by a prominent Berlin official, fully approved by public opinion, saving occasional weak protests from the Socialists, contrasts strangely with the persistent criticism of colonial government in the press and on public platforms in this country.

South-West Africa.—Misguided as was German policy in all the colonies, there is nothing elsewhere to compare with the infamous

story of South-West Africa. Full details of the horrors perpetrated there—as full as decency of language permits—are now for the first time supplied by the Blue Book [Cd. 9416] entitled "A Report on the Natives of South-West Africa and their Treatment by Germany." Unfortunately England incurs the responsibility of having permitted Germany to annex this region, whose inhabitants believed themselves to be living under British protection. Both the Cape Ministry and the Home Government lacked courage and decision till they were jockeyed by Bismarck into a recognition of a German protectorate. It may be said for them that the published sentiments of the German Government were those of the Berlin Act, and our Prime Minister excused the British withdrawal by publicly declaring that "if Germany wished to acquire colonies, her co-operation in the work of civilisation would be welcome." Lord Fitzmaurice, the biographer of Lord Granville, claims with a pride which is hardly justified by events that "the Foreign Office had extricated itself at Berlin from a difficult position, and had succeeded in effecting a permanent settlement of momentous questions without loss either of dignity or of any important national interest."

The Germans, after getting rid of the British claims in 1884, took no effective steps towards exercising dominion till 1890, thus showing their own claims to be mere pin-pricks of Bismarckian diplomacy. Urged by the *Kolonialgesellschaft*, they then sent out as administrator Capt. C. von François with an armed force of twenty-one men. At this time the territory contained a population of about 240,000, of whom the Ovambos, living in the extreme north, and numbering about 100,000, may be left out of count, as they never came into close contact with the Germans. The tribes with whom von François had to deal were chiefly the Hereros, numbering about 80,000, and the Witbooi Hottentots, about 20,000. Between these two a feud was on foot, and the new administrator, acting on the principle of *divide et impera*, and conscious of his own weakness, took the part of the stronger party, though he could give him no effective support. Warned of expected German reinforcements, Hendrik Witbooi had made peace with the Hereros, before the German garrison was increased in 1893 to about 250 men with two batteries of artillery. Von François, as he himself records, then "decided, after weighing all the circumstances, for the purpose of intimidating the others, to give one of the native races an impression of our power." Accord-

ingly, with the greatest secrecy a treacherous attack was made upon Hornkranz, the Witbooi location : men, women and children were slaughtered to the number of about 150. After this, as the Blue Book report observes, " Germany's prospects of ruling the natives by kindly sympathy and mutual co-operation (had she ever intended so to do) vanished for ever ; her only way to gain ascendency was by pitiless severity and brute force."

The German Government fully approved von François' action at Hornkranz and promoted him major. They evidently had misgivings, however, for at the end of 1893 they sent out Major Leutwein to report on the situation, with a commission to take over the command in case of François' death or incapacity, but otherwise not to interfere in the military conduct or administration. Leutwein in fact became Governor in 1894 and ruled for the next ten years. Although he was ultimately superseded because his policy was not sufficiently thorough to satisfy the German settlers, this man does not seem to have been wanting in the Machiavellian qualifications. Dissimulation, trickery, and perfidy were legitimate weapons for use in dealings with the coloured tribes. Thus in regard to the agreements made before his time with the native chiefs, he repudiated the German obligations, as occasion dictated, on the grounds that they had been made by German agents without due authority, while he insisted on the performance of all their covenants by the chiefs. It may be admitted for him that his policy was to avoid war, and to succeed if possible by state-craft. Such state-craft as his, however, was certain to lead to war, and it did. He might have done better if the power had been wholly with him, but his hands were forced by Berlin. In 1892 a syndicate, under the auspices of the Colonial Company, had applied for a concession of 4,500,000 acres for land settlement. They were informed that the land was occupied and claimed by the various tribes. Consideration of the application was not, however, rejected on that account, but only deferred because " the troops in occupation were not strong enough to occupy and protect the area." The syndicate took the matter into their own hands, and began parcelling out farms, under sanction from Berlin and in spite of von François' expostulation. The land required had to come chiefly from the Hereros, who, to the amazement of Leutwein, showed a " dark distrust " of the Germans since the affair of Hornkranz. Such was the situation with which Leut-

wein had to deal. He proceeded to cajole a drunken Herero chief, who was not recognised by the tribe, into signing an agreement giving up the tribal rights to a large section of their territory. The new boundaries were not even marked out, and the German settlers then without notice impounded as trespassers the thousands of Herero cattle found on the ground. Leutwein complacently remarks that whereas such confiscation would formerly have led to war, "we had by the above-mentioned agreement obtained the legitimate rights thereto." His proceedings would have inspired a less patient race than the Hereros to instant war. He feared it, and attempted to disarm them. They refused to give up their arms. Fighting ensued during which a Hottentot tribe was practically exterminated (*so gut wie vernichtet*). Two of the Herero chiefs then came to German headquarters for a parley; they were shot as rebels! The history of the next eight years (1896–1904) is a disgraceful record of oppression and robbery. No regard was paid to the boundary as vaguely drawn by the agreement with the drunken chief; the lands of the tribes were invaded by German settlers wherever they listed: the tribal cattle were seized in thousands, including the sacred herds of the Hereros; the burial grounds were ruthlessly included in German plantations; the young girls were seized for concubinage, in some cases bayoneted after violation; every step in the infamous process was marked by murders, for the punishment of which no courts of law existed. The murder of the chief of the Bundelswartz Hottentots at the end of 1903 was the spark which caused the conflagration known as the great Herero rising. At this juncture Leutwein was superseded by the notorious von Trotha.

The poor Hereros, though aided by the other tribes, had but little prospect of success. Their total man-power numbered only about 8,000, of whom only 2,500 had rifles, and they had but a scanty supply of ammunition. They at least were prepared to conduct war on civilised lines, for their first step was to protect all German women and children within their power. The Germans shrank from no acts of treachery or breaches of the laws of war. Surrender was rendered impossible by the murder of Herero leaders who came to negotiate under promises of safe-conduct. Von Trotha had at the outset proclaimed that the war was not to be waged by the Germans on civilised lines. According to his infamous Extermina-

tion Order, no Herero, man, woman or child, was to receive mercy or quarter; "kill every one of them," he said, "and take no prisoners." As he subsequently reported, "I wished to ensure that never again would there be a Herero rebellion." The order was carried out with ruthless ferocity, as may be read in the Report. Men, women, children and babes at the breast were butchered with savage atrocity, by bullet, bayonet, club or fire.[1] "Out of between 80,000 and 90,000 souls, only about 15,000 starving Hereros were alive at the end of 1905, when von Trotha relinquished his task." His successor, von Lindequist, seems to have made up his mind that the German objects had been attained and that the miserable remnants of the tribes would be no longer dangerous to German power, and were indeed necessary for the supply of labour. He proclaimed protection to the refugees who tardily ventured to surrender, but a general peace was not effected until the end of 1906. To Germany could then be applied the words of Tacitus, *solitudinem faciunt, pacem appellant.* The Germans had in the country for the suppression of the rebellion an army of 19,000 men, fully equipped with artillery and other munitions of war, a force admittedly far in excess of necessities; and there are grounds for believing that this army was intended for use against the Cape Colony in the event of a war with England.

Von Lindequist promised the refugees protection and work on their surrender. He in fact reduced them to slavery. They were set to forced labour on harbour works and railway construction, where upwards of 60 per cent. died of starvation or under the lash of the overseer. Of 3,500 who were so taken to Shark Island only 193 returned; 3,307 had died on the island. Others were taken to the Cameroons, where about two-thirds left their bones. Von Lindequist in his amnesty proclamation as set out in the Blue Book had said, "I have taken every precaution to ensure that you will be justly treated." The miserable residue who returned to their native districts were subjected by "pass-laws" to forced labour. All their former means of livelihood had been taken from them, their lands and herds confiscated. It was not until after the

[1] One wonders how even German soldiers could do the deeds described. The mental attitude of those who took part in them is shown in *Peter Moor's Journey to South-West Africa* (Frenssen)—translated by Mrs. May Ward. "The Prussian was born a brute," said Goethe, "and civilisation will make him ferocious."

Extermination Order had done its work that the German Government took any steps to protect the native against irresponsible punishments. By the decree of April 1896, applied in November to South-West Africa, various restrictions were enacted, among others that death sentences must be confirmed by the Governor. But the decree made no provision for ensuring proof by sufficient evidence, or for recording the evidence. Thus, in a case which occurred during the war in 1915, a German officer, on a report of some cattle having been stolen, searched the bush in the neighbourhood, and, finding eleven natives, condemned and shot two of them without any evidence of their personal guilt. Another provision of the decree permitted severe *disciplinary* punishments of flogging and imprisonment to be inflicted on natives in service. Such were the conditions prevailing when General Botha occupied the country in 1915.

The history of German administration in East Africa is happily less open to severe criticism. Its early pages are stained by the deeds of the notorious Peters, and by the inhumanities of von Trotha in the suppression of the Arab rising ; but its subsequent exploitation was carried out under the more intelligent direction from Berlin of Secretary Dernburg. The policy there adopted seems to have been marked with less stupidity than elsewhere. In South-West Africa the story of German dominion is a continuous record of robbery, fraud, and murder, eternally shameful to the honour of a Christian nation. It is impossible to conceive that the Peace Conference can agree to hand back the native tribes to the tender mercies of those by whom they have been so grievously misgoverned, or to permit the whole future development of Africa to depend on the goodwill of a Power whose intention was to use that continent for the strategic purposes of world-domination.

THE RULE OF DORA.

[*Contributed by* SIDNEY W. CLARKE, ESQ.]

OF the phenomena exhibited during the four years of warfare, none is more remarkable than the docility with which the people of this country submitted to the abrogation of many of their most cherished rights. Restrictions which must have been a torment to the restless spirits of Hampden and Wilkes, and even led the more ancient shades of King John's barons to contemplate another expedition to Runnymede, were received and obeyed almost without question. Such fundamental principles of the Constitution as those expressed by the phrases Government by Parliament, the Responsibility of the Executive to the Legislature, the Liberty of the Subject, Trial by Jury, Open Law Courts, Freedom of Speech, the Freedom of the Press, and An Englishman's House is his Castle, were attacked, whittled down, and in some cases reduced to mere shreds of their former consequence. What Dicey calls the essential characteristic of the British Constitution, namely "the absence of arbitrary power on the part of the Crown, of the Executive, and of every other authority in England," went into retirement, and the old, long-unused Prerogative was exalted as it had not been since the days of Charles I. and Strafford. And very little objection was made. People acquiesced in the forging of the unaccustomed fetters, they gave the novel Regulations a pet name, and, when any particularly vexatious restriction came along, they shrugged their shoulders, said it was only "Dora's" little way, and for the most part loyally observed it.

Constitutional Restriction.—Future historians, writing in the calm detachment of retrospect, will probably have much to say on the constitutional aspect of this bloodless revolution, for such it was, though, it is to be hoped, only a temporary one, and will discuss at length the conditions under which an almost moribund

Parliament, with an exhausted mandate, was allowed to prolong its existence from year to year in order that it might register and give the semblance of law to the decrees of what was to all intents and purposes military dictatorship. The carefully elaborated protection of parliamentary procedure was thrust aside; discussion was curtailed, if not suppressed, measures were rushed into law with lightning rapidity, and when Parliament did raise any strenuous objection to the proposals of the Executive the particular Bill or clause was dropped, and the desired result obtained by departmental Regulations. For Government by Parliament there was, in effect, substituted Government by a small Inner Cabinet, which in its turn set up Government by Departments and "competent" authorities. The citizen was controlled in his actions, his speech, his food, his drink, in practically everything except his thoughts, and even those it was endeavoured to influence by an elaborate system of Censorship, Propaganda, and "Information."

Declaration of War. — Stern necessity was the parent of the earlier restrictions. When war came, it found the country unprepared, and prompt action had to be taken to cope with an unfamiliar position. First came measures to prevent or allay financial panic; the hostile, or potentially hostile, population in our midst had to be rendered impotent for harm; naval and military supplies of all sorts had to be ensured by increased powers of requisition; the food stocks of the country had to be reckoned and husbanded; the liquor traffic to be placed under control; and the long-dormant Prerogative of the Crown in connection with the public safety and the defence of the realm had to be hastily revived and proclaimed. Four days after the declaration of war the first of the Defence of the Realm Acts (popularly known as "Dora") became law, and there commenced the issue of the long series of regulations by which the civil population has been controlled during the last four years.

The First Defence of the Realm Act.—In form the first of these Acts was mainly a declaratory measure. It did not so much purport to make law, as to state the nature of the Royal Prerogative. It affirmed that:

> His Majesty in Council has power during the continuance of the present war to issue Regulations for securing the public safety and the defence of the Realm, and as to the powers and duties for that purpose

of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf; and may by such Regulations authorise the trial and punishment of persons committing offences against the Regulations.

Here was no new power created, though, by succeeding provisions and the amending Acts, and by certain Orders in Council, it was provided that it should be lawful for the Admiralty, or the Army Council, or the Ministry of Munitions, or other authority concerned, to do things that were not within the obvious scope of the Prerogative. At the outset the powers exercised by the respective authorities do not appear to have much exceeded the Prerogative recognised in the *Case of Shipmoney*,[1] when due allowance is made for the greatly changed conditions of warfare. In one of the earliest cases in which the Defence of the Realm Regulations were considered by the judges, namely, *Re a Petition of Right*,[2] which involved the right to take land without paying compensation, it was argued that the Prerogative, and consequently the Regulation in question, could only be operative in the case of actual invasion,[3] but the Court of First Instance and the Court of Appeal expressed the opinion that in modern warfare the safety and defence of the realm required action long before a hostile soldier trod our soil on hostile intent.

The Extension of the Prerogative.—Later Regulations, however, seem to have stretched the Prerogative and what was necessary to secure safety and defence to a considerable extent. It may be admitted that matters appertaining to the organisation, equipment, supply, and operation of His Majesty's forces and ships, and to the prevention of disaffection at home and the rendering of direct or indirect assistance to the enemy, are essential necessities in war-time; but it is not so easy to see, for example, how an amendment of the Dogs Act, 1906,[4] or the prohibition of dog-shows [5] come within that category, or how the sale or gift of cocaine or opium [6] to an actress would endanger the successful prosecution of the war.

Powers of the Executive.—The truth seems to be that, while no one would seriously quarrel with the general nature and scope

[1] (1637) 3 State Tr. 575.
[2] [1915] 3 K.B. 649.
[3] See the *Saltpetre Case*, (1606) 12 Co. Rep. 12.
[4] Regulation 2 S.
[5] Regulation 9 DD.
[6] Regulation 40 B.

of the Acts and the Regulations thereunder, the various bodies empowered to frame regulations lost sight of the first general and directory Regulation, which stated that:

> the ordinary avocations of life and the enjoyment of property will be interfered with as little as may be permitted by the exigencies of the measures required to be taken for securing the public safety and the defence of the Realm,

and sought the easy method of a departmental ukase to procure powers which they were not inclined to or could not obtain from Parliament. A further criticism is perhaps permissible, that the persons entrusted with the execution of the Regulations—the "competent naval or military authority" (*i.e.*, any officer not below the rank of lieutenant-commander in the navy or field-officer in the army), and any person authorised by him, and, in many cases, any police constable—were to a large extent irresponsible. There was no appeal from their directions, they could act on mere suspicion,[1] or on hearsay evidence,[2] and, provided they acted reasonably and in good faith, their decisions were conclusive.[3]

Spreading False News.—It is probable that much of the dissatisfaction expressed at the Regulations—and, as stated at the outset, they have met but little real antagonism on the part of the general public—has been due more to injudicious handling by a not very competent authority of a non-essential, even if legal, regulation, than to any desire to oppose restrictions that most people felt to be right in the main. The public generally were quick to recognise that war-time measures cannot be judged by peace-time standards; but they did resent what appeared to them to be unnecessary and needlessly harassing restrictions, and in particular the occasional sheer officiousness of officials. Take, for example, Regulation 27, which prohibits the spreading of false reports and the making of false statements. So long as the reports or statements are calculated to interfere with the prosecution of the war and the like, no one would object. But the Regulation goes much further, and is in terms aimed at statements and reports that need not be false to the knowledge of the speaker nor have any concern whatever with the war or the security of the country.

[1] *Ronnefeldt* v. *Phillips*, 34 T L.R. 556.
[2] *Michael* v. *Block*, *ibid.* 438.
[3] *Sheffield Conservative and Unionist Club Ltd.* v. *Brighten*, [1916] W.N. 277.

Suppose a newspaper by mistake reports that an eminent actor has gone to America, when in fact the gentleman had gone to play golf at St. Andrews. A reader who repeats the item of news to a friend would seem to be within the Regulation and be in peril of six months' hard labour. Further, if he makes the statement to his friend over the breakfast-table, under Regulation 51 his house may be raided by the "competent authority" or a zealous police constable, "if need be by force, at any time of the day or night," in search of incriminating documents. And yet what possible harm has he done to the defence of the country or the prosecution of the war, and how can he be constitutionally liable, by reason of an innocent error, to pains and penalties that may be all very well for open or secret enemies or traitors?

The Case of the Four Citizens of Birmingham.—That the framers of the Regulations spread their net wider than the Prerogative entitled them to, and that those entrusted with the execution of the Regulations did occasionally transgress their constitutional authority, is evidenced by several cases denounced in Parliament and by the Press. There was, for instance, the case of the four citizens of Birmingham, which aroused a good deal of interest towards the end of 1916. Regulation 43, which is one of the regulations headed "Interference with Military Duties, and with War Supplies," provides that "No person shall obstruct, knowingly mislead, or otherwise interfere with or impede, or withhold any information in his possession which he may reasonably be required to furnish from any officer or other person who is carrying out the orders of the competent naval or military authority." Regulation 53 provides that "the competent naval or military authority . . . may by order require any person or persons of any class or description to furnish him, either verbally or in writing, with such information as may be specified in the order, and the order may require any person to attend at such time and such place as may be specified in the order for the purpose of furnishing such information." The four gentlemen of Birmingham, all of them, if recollection serves, filling public offices in the city, were members of the Society of Friends, and appear to have become objects of suspicion to the "competent military authority." In order, so the *Birmingham Post* declared was stated by the prosecuting solicitor—"in order to find out whether there existed any material

for making a charge against them," the authority proceeded to administer interrogatories to the suspects. These were ten in number, but only two need be quoted: "Have you supplied any money, either privately, or through any society to which you belong, or of which you have knowledge, for the upkeep or support or payment of propagandists whose efforts have been directed against the war either directly or indirectly?" "You are required to produce for inspection your cheque and bank pass-books, and to answer any question in regard to any item." [1] Could inquisition go further? Yet when these Quakers declined to submit to this catechism they were proceeded against for offences against the Regulations mentioned above. No wonder the Government, when questioned in Parliament, had to repudiate the action of their delegate, and no wonder the Press protested in scathing terms against "an unwarrantable attack on what we had supposed to be the inalienable right of every Englishman, his personal liberty in his own home." [2]

Submission to Dora.—Space does not allow a detailed examination of the Regulations, nor is one needed, for are they not to be found in serried array from 1 to 66 or more, with their A's, B's, C's, and all the letters of the alphabet, in between, in the bulky Defence of the Realm Manual, prepared under the competent editorship of Mr. Alexander Pulling? For more than four years the country has submitted to Dora and her vexatious orderings. But people will be glad to feel that their liberty of action and speech is once again only checked by the ordinary law of the land, that the old constitutional privileges and rights are restored, and that there is no longer truth in the taunt flung at us by the enemy—"The Cabinet gives no regular account to Parliament, does not consult the Party leaders, and hardly answers the questions that are put. It governs England by means of a new bureaucratic machine, which interferes in everything, controls everything, and is itself as good as free from parliamentary control." [3]

[1] *Birmingham Post*, November 14, 1916.
[2] *Vide* the *Times*, November 10, 1916.
[3] *Vide* the *Cologne Gazette*, as quoted in the *Times*, January 7, 1918.

ORIGIN AND GROWTH OF INCOME TAX.

[*Contributed by* H. BERTRAM COX, ESQ., C.B., *Solicitor to the Inland Revenue.*]

Origin and Growth of Income Tax.—Income Tax had its origin in the financial necessities occasioned by the expenses of the great war with France at the end of the eighteenth century, and the responsibility for its introduction rests on the shoulders of William Pitt. It was at his instance that in 1798 an act was passed entitled "An Act for granting to His Majesty an aid and contribution for the prosecution of the War" which imposed duties regulated by the amount of income possessed by a person charged with "Assessed Taxes" [1] provided that he possessed an income of £60 or upwards. These duties, which are known as the Triple Assessment, amounted to something less than Income Tax as we understand the expression now, and, moreover, owing to what Pitt characterised as "shameful evasion, or rather, scandalous frauds," they were a financial disappointment, but they made a beginning, and they paved the way for the real thing which came in the following year, 1799.

Pitt's Act of 1799 [2] repealed the 1798 duties and imposed a regular tax on incomes at the rate of 10 per cent. A general statement of income from all sources was required from the taxpayer, and the assessment was made on the total income subject to certain deductions, some of which after long disuse have been revived only in recent years, as, for example, deductions for children and for repairs of property. Incomes under £60 were not charged, between £60 and £200 the rate was graduated, but on incomes of £200 and upwards the tax fell at the full rate of 10 per cent. The yield in the first year was a little more than £6,000,000.

In the short interval of peace that followed the Treaty of Amiens

[1] The "Assessed Taxes" included taxes on carriages, horses, men-servants dogs, etc., also the Window Tax, and the duty on Inhabited Houses.

[2] 39 Geo. III. c. 13.

in May 1802, Addington repealed the Income Tax, stating that he considered it a tax to be reserved for war purposes; but on the resumption of war in the next year, it was revived by the Income Tax Act of 1803.[1] In this Act is embodied for the first time a principle which has been of incalculable benefit to the revenue of this country, and which in spite of some modern encroachments remains the great buttress of Income Tax stability and efficiency—the principle of taxation at the source. The tax was mapped out into the five great heads or schedules which remain with us to this day, Schedules A, B, C, D, and E.[2] Pitt's statements of total income were dropped, and in their place statements of income from particular sources were required. Some stress was laid on the advantage to the taxpayer in not having to disclose his total income, but it is likely that the real reason for the change was the desire to check evasion. Perhaps both results were aimed at. Both were at least partially achieved. In the complacent words of an official publication of the time, "The change is gradually diffused from the first possessor to the ultimate proprietor, the private transactions of life are protected from the public eye, and the revenue is more effectually guarded." As a result of the change the yield of the tax, although the rate was only 5 per cent., was almost equal to the yield in 1799 when the rate was 10 per cent.

The next important Act was that of 1806,[3] which embodied the regulations of an act which had been passed in the previous year. Notwithstanding improved methods, evasion of taxes was so prevalent that it was found necessary to withdraw on that account the allowance for repairs of property. The deduction for children was also discontinued. Moreover, it would appear that large numbers of people had been content, in defiance of the facts, to return their total incomes as just below £60—till then the limit of

[1] 43 Geo. III. c. 122.

[2] The classes of property and profits taxable under these heads are as follows (see first schedule to the Act of 1918):

Schedule A, property in lands. Schedule B, occupation of lands. Schedule C, profits derived from any public revenue. Schedule D, profits derived from trades, professions, employments and vocations, and from interest, etc., not otherwise charged, and from any property wherever situate accruing to any person residing in the United Kingdom. Schedule E, public offices or employment of profit, and annuities, pensions, or stipends payable by the Crown or out of the public revenue of the United Kingdom except annuities charged under Schedule C.

[3] 46 Geo. III. c. 65.

exemption. To catch these malefactors and to take advantage of the statements contained in their claims of exemption, the 1806 Act reduced the limit of exemption to £50, and at the same time confined the exemption to incomes from professions, trades, and offices. A publication issued by the Tax Office at the time comments curiously on these offenders:

> It is notorious that persons living in easy circumstances, nay, even in apparent affluence, have returned their income under £60, although their annual expenditure has been treble that sum, and to whom there was no ground for imputing extravagance. . . . Hence it is that the Legislature found the necessity of confining the exemptions to £50, that their former returns may be made use of.

After Waterloo the Government proposed to reduce the tax by one-half, but under pressure of public opinion they were compelled to relinquish it altogether in 1816. Its yield at this time exceeded £14,000,000. Then, for a quarter of a century, it remained an unused instrument of finance until it was revived by Sir Robert Peel in 1842 by 5 & 6 Vict. c. 35, an Act which forms the basis of the existing Income Tax code. Peel's Act of 1842—which it may be remarked was not a measure of war finance, but was introduced to enable him to effect fiscal reforms and to improve the commerce and manufactures of the kingdom—was very largely based on that of 1806, in fact it was not much more than a reprint of the Act of 1806 with certain additions and modifications. Peel's Act did not extend to Ireland, because the abolition of the Assessed Taxes [1] in Ireland in 1823 had destroyed the machinery for assessment and collection. The exemption limit was fixed at £150. The duties were levied under the five familiar schedules and the tax in its structure, chief principles, and general scheme of administration was not seriously modified until quite recent years.

The next important stage was reached in 1853 when Mr. Gladstone left his mark upon the tax in some important particulars, notably in bringing Ireland within its scope and in reviving the deduction for life insurance premiums. The Act of 1853 did more than merely make alterations in the law; it embodied Mr. Gladstone's views for the future of the tax. It was imposed for a definite period of seven years, at rates diminishing at first from 7*d*.

[1] See note 1 on p. 42.

in the £ to 5*d.* in the £ in the last three years, the intention being that on April 5, 1860, the Income Tax should die a peaceful death. But the Crimean War disturbed this arrangement; 1855 and 1856 found the rate at 1*s.* 4*d.* in the £, the highest point reached since the reintroduction of the tax in 1842 until the outbreak of the war in 1914, and 1860 came and went leaving the tax full of life and vigour.

The year 1861 saw the appointment of a Select Committee on Income Tax, which with Mr. Hubbard as its Chairman inquired, among other matters, into the possibility of differentiation between "industrial" and "spontaneous" incomes, or "earned" and "unearned" incomes as we now call them, but came to no definite conclusion on this or on any other point except to say that the objections urged against the tax "are objections to its nature and essence rather than to the particular shape which has been given to it," and that they felt so strongly "the dangers and ill consequences to be apprehended from an attempt to unsettle the present basis of the tax without a clear perception of the mode in which it is to be reconstructed," that they were not prepared to offer any suggestions for its amendment.

So the Income Tax went on its way with minor changes, but with no dangerous excitement until the dissolution of Parliament in 1874, when Mr. Gladstone in a manifesto to his constituents proposed the complete abolition of the tax, which it had been the "happy fortune" of Mr. Lowe to reduce from 6*d.* to 3*d.* But Mr. Gladstone was not returned to office, and the new Chancellor, Sir Stafford Northcote, while reducing the rate still further to 2*d.* in the £—the lowest point it has ever touched—kept the tax in being.

The year 1880 is noticeable for the passing of the Taxes Management Act,[1] which consolidated the laws dealing with the machinery and administration of the tax. From this date until 1907—with the exception of the revival of allowances for repairs of property and the extension of the limits of exemption and abatement in 1894—the history of the tax offers no very striking features.

In 1907, following upon the reports of the Departmental Committee of 1905 and the Select Committee, of which Sir Charles Dilke was Chairman, of 1906, there began a movement in the direction of change and of more intimate adaptation of the tax to the circumstances of the taxpayer and to modern business condi-

[1] 43 & 44 Vict. c. 19.

tions, which has had a remarkable and almost revolutionary effect upon the development of the tax. The first great innovation was the differentiation of rates as between earned and unearned incomes (Finance Act, 1907).[1] This reform, unsuccessfully attempted by Disraeli, resisted by Pitt, by Peel, and by Gladstone, was recommended by the Select Committee of 1906, introduced by Mr. Asquith, and carried out without any serious friction or inconvenience. The 1907 Act contained also many minor but very useful provisions based largely on the Report of the Departmental Committee of 1905.

The next important step was taken by Mr. Lloyd George in the Finance Bill for 1909, which ultimately became law in 1910 as the Finance (1909–10) Act, 1910.[2] By this Act, following again a recommendation of the Select Committee of 1906, a super-tax was imposed on incomes exceeding £5,000 at the rate of 6*d.* for every pound by which the total incomes exceeded £3,000. Among other provisions of the 1909–10 Act were the revival of the allowance for children, a great extension of the 1894 allowance for repairs and maintenance of agricultural and cottage property, and an extension of the principle of differentiation from the former £2,000 limit up to £3,000. After an interval of a few years necessary for the assimilation of the recent changes a great development of the principle of graduation was effected by the Finance Act, 1914,[3] the last Finance Act passed before the war. By this Act the taxation of earned income proceeded by four steps, instead of two, before the maximum rate was reached in the case of incomes over £2,500, and for the first time there was a beginning of graduation in unearned incomes, with two steps leading to the maximum when the income exceeded £500. Further graduation among the higher incomes was carried out by a great modification of the super-tax. Liability to super-tax was made to begin at £3,000 instead of £5,000, and in place of the old flat rate of 6*d.* there were seven rates to a maximum of 1*s.* 4*d.* The second Finance Act of 1914,[4] passed after the outbreak of war, increased all the rates, but left the system of graduation unchanged.

Since then there has been further progress in graduation, the number of steps has been increased both for earned and unearned income and for super-tax, and, as a temporary war measure, a new

[1] 7 Ed. VII. c. 13.
[2] 10 Ed. VII. c. 8.
[3] 4 & 5 Geo. V. c. 10.
[4] 5 Geo. V. c. 7.

set of rates has been granted to soldiers and sailors and merchant seamen.

In addition to this remarkable growth of differentiation and graduation the last few years have seen the extension of liability to incomes between £130 and £160, which nearly doubled the number of persons who come under the review of the Inland Revenue Department as having incomes over the exemption limit.

Payment of the duty by instalments—half-yearly and quarterly—has also been reintroduced recently to meet the classes of cases in which payment of tax in a single sum has been found to involve hardship.

The Confusion of the Acts and the Act of 1918.—The system of taxation so established had been built up in statute after statute, but no attempt had ever been made to bring all the statutes together. Consequently the Income Tax Act, 1918, reproduces provisions contained in some fifty-two statutes which, beginning with the year 1842 down to the year 1918, had become more and more perplexing to the taxpayer. It contains 239 sections and seven schedules and embodies the enactments dealing with this complicated branch of law as they stood immediately before August 8, 1918. It will not for long retain this privilege. Every year a new Finance Act will infallibly add to and amend it, and the inquiry into the nature, incidence, and collection of income tax, which has been foreshadowed as imminent at the conclusion of the war, will doubtless lead to such alterations as to make inevitable its repeal and re-enactment with amendments in a new consolidating Act. Still, as it stands it possesses the merit of enabling the lawyer, if not the layman, to ascertain upon what and why he is taxed, and enabling the members of any Royal Commission or Parliamentary Committee which approaches the subject of income tax to find in one document all the statutory provisions with which they need concern themselves. The confused state of the law had long been a source of trouble to practitioners, to the taxpayer, and last, but not least, to His Majesty's judges, who from time to time had commented upon its confusion and called for its consolidation. In fact few except those who, by reason of their calling, were called upon to administer the law of income tax all day and every day of their lives could walk with any certainty through the

tangled jungle of confused provisions, and even they were occasionally caught tripping by the Courts.

A single instance, one out of many which might be given, will illustrate the difficulties which the taxpayer found in front of him in respect of the simple question of the allowance for life insurance premiums.

In the year 1917, we will say, A, who is a man whose belief in life assurance as a desirable thing in itself is strengthened by the vague knowledge that he need not pay Income Tax on the amount of his life assurance premiums, sets out to learn the legal position in greater detail before he decides his course of action.

He calls upon the Surveyor of Taxes to ask what section of what Act he must consider before he makes up his mind, and is told that in no one section and in no one Act is full knowledge to be found, but that, though s. 54 of the Act of 1853 which granted the allowance is still in force, it has been so altered by subsequent enactments that there are at least ten Acts that A must consult if he wants to be quite sure of his ground.

Having obtained the necessary references A collects the Acts and sits down to their perusal.

S. 54 of the Income Tax Act of 1853 tells him that the maximum allowance is one-sixth of his total income, but this is complicated by s. 26 of the Finance (No. 2) Act, 1915, which gives one-sixth of the income for the year 1913–14 as an alternative maximum, and by s. 37 of the Finance Act, 1916, by which premiums to cover war risks are allowed irrespective of the limit of one-sixth.

He finds that while s. 54 of 1853 confines the allowance to "annual" premiums s. 37 of 1916 allows war premiums whether annual or not.

Again, from s. 54 of 1853 he realises that the insurance allowance is in effect confined to premiums paid to British insurance companies. He reads on and learns that the Income Tax (Insurance) Act, 1855, allows premiums paid to a registered friendly society, but only if the premiums are paid not more frequently than once a quarter, and not until he reaches s. 10 of the Revenue Act, 1903, does he know that this restriction has been done away with. In the Income Tax Act, 1859, he reads without emotion that premiums on contracts for deferred annuities made with the Commissioners for the Reduction of the National Debt are a permissible deduction.

It interests him more to discover that the allowance was extended to include premiums paid to colonial companies by s. 9 of the Finance Act, 1904, and to any insurance company "lawfully carrying on business in Great Britain or Ireland" by s. 11 of the Revenue Act, 1906. This makes it clear to him, after a little meditation, that the great American insurance companies, with offices in this country, are not excluded from the scope of his possible operations.

S. 19 (2) of the Finance Act, 1907, enacts that the allowance shall be made primarily from A's "earned" income, but if A is a soldier or a sailor he finds this arrangement altered in his favour by s. 11 of the Finance Act, 1917.

S. 17 of the Finance Act, 1915, restricts the allowance, in the case of a policy for securing a capital sum on death, to 7 per cent. of that capital sum; s. 37 of the Finance Act, 1916, excepts war premiums from this limitation, but s. 36 of the same Act lays it down that if A's policies are taken out after June 22, 1916, the tax to be allowed shall not exceed 3s. in the £.

If A hankers after endowment policies and other forms of "fancy" insurance, his enthusiasm is checked by s. 17 of the Finance Act, 1915, which, with regard to policies and contracts other than those which secure a capital sum on death, limits the allowance to a maximum of £100, and it is extinguished by s. 36 of the Finance Act, 1916, which abolishes the allowance altogether in the case of such policies made after June 22, 1916.

It is easy to imagine the condition of the mind of A after he has picked his way through s. 54 of the Income Tax Act, 1853; s. 1 of the Income Tax (Insurance) Act, 1853; s. 1 of the Income Tax (Insurance) Act, 1855; s. 6 of the Income Tax Act, 1859; s. 10 of the Revenue Act, 1903; s. 9 of the Finance Act, 1904; s. 11 of the Revenue Act, 1906; s. 19 of the Finance Act, 1907; s. 17 of the Finance Act, 1915; s. 26 of the Finance (No. 2) Act, 1915; ss. 36 and 37 of the Finance Act, 1916, and s. 11 of the Finance Act, 1917, all for the apparently simple purpose of learning what Income Tax allowance he can get for his life insurance premiums. He finds it very difficult to believe that all these Acts and sections are still fully operative, and wonders irritably why they have never been brought together in a comprehensive form in some recent statute. As a matter of fact A will probably give up the search in bewilderment long before he has arrived at the truth of the matter.

It may be added that with the exception of the temporary enactments due to war conditions, one section (No. 32) of the Consolidation Act covers practically the whole of the provisions that were formerly dissipated over so many statutes.

Other instances of a similar character might be given. The Act of 1918 has reduced this chaos into order. The task of consolidation was, as may be gathered from the illustration just given, no light one, and the history of the Bill, which can be very briefly stated, shows that great care and trouble were taken at every stage to ensure accuracy in the reproduction.

History of the Act of 1918.—The draft of a consolidation Bill was referred by the Commissioners of Inland Revenue to a committee of departmental experts presided over by the draftsman of the Bill, and after over 180 meetings and much revision, especially in the matter of arrangement, was submitted by the Commissioners of Inland Revenue to the Chancellor of the Exchequer, and by him referred to the Lord Chancellor. Lord Finlay introduced the Bill in the House of Lords and after second reading referred it to a Joint Committee of both Houses. The members of this committee were Lord Loreburn, Lord Sanderson, Lord Wrenbury, Lord Parmoor and Lord Muir-Mackenzie, Sir C. Hobhouse, Sir J. G. Butcher, Mr. Rawlinson, K.C., Mr. Dundas White, and Mr. J. O'Connor. The Committee met in May 1918 and sat until August, when the Bill was reported to the House.[1] On reaching the House of Commons it made rapid progress, and with some amendments suggested by the Joint Committee passed through all its stages just before the adjournment of Parliament. In this connection two matters should be mentioned.

Independent criticism from the public as opposed to the departmental point of view was most fortunately provided by the presence of Mr. Randle Holme, a London solicitor of great experience in matters of taxation, who attended every meeting of the Committee and whose criticisms and suggestions were of great value. Mr. Holme had himself drafted a consolidation bill which he generously placed at the disposal of the departmental committee which was revising the Inland Revenue draft. Mr. A. M. Bremner, well known as one of the most experienced members of the Bar in this branch of law, also gave great help. The Parlia-

[1] See Report of July 24, 1918, No. 95.

mentary Counsel rendered invaluable assistance by going through the Bill with the utmost care and attending the Committee.

Consideration was further facilitated by furnishing to each member of the Joint Committee a volume containing on one side of each page a clause of the Bill and on the other the corresponding sections of the earlier Acts. Without such a text book the comparison of the relevant provisions of Bill and statute would have been almost impossible, as each member would have needed at his side about fifty different Acts. The preparation of this print entailed much labour, but was considered to be and proved to be essential.

In the result the Bill assumed the form now presented by the statute of 1918, and a few points may be noted as to arrangement and as to certain specific provisions. The report of the Parliamentary Committee contains in Appendix I. a record of the variations from the earlier statutes, and to this appendix reference should be made by those whose interest leads them to make a close study of the Act.

With regard to arrangement, it will be remembered that the Act of 1842, as amended by the Act of 1853, commenced with provisions as to the appointment of commissioners and then proceeded to deal with matters of charge. The consolidating Act approaches the subject from the point of view of the taxpayer and places in the forefront the provisions with which he is primarily concerned. It therefore deals first with the charge of tax and of super-tax, next with "exemption, abatement and relief," and later, in Parts V., VI., VII. and VIII., with the machinery by which the tax is assessed and collected. It is perhaps unusual to find that the first section of the Act at once despatches the reader to a schedule in order to find matters with which he is most vitally concerned and which are without doubt the most important provisions in the Act. But for reasons derived from the earlier Acts themselves, the Parliamentary Committee decided to transfer these very important provisions to the first schedule. It was thought inadvisable at this date to discard the old familiar titles of Schedule A, Schedule B, Schedule C, Schedule D, and Schedule E. Strictly speaking these are not schedules, but categories or classes of property or profits which are levied upon in the manner described under each head. If, however, the name "Schedule" was to be continued, it was considered,

after much discussion, that the proper place for those provisions was in a schedule to and not in the body of the Act, in spite of the fact that they contained very important matter. Accordingly these provisions are to be found in orderly and logical sequence in the first schedule. Part IV. contains matter conveniently grouped under the head "Special Provisions." These sections embody the enactments passed in consequence of the war, and their collection under one head is convenient both for purposes of reference and also for the purpose of repeal, when the time arrives for their disappearance from the Statute Book. Some revision of the earlier Acts became necessary in consequence of the adoption of modern methods of accounting and payment which had been established since 1880. On this matter the memorandum prepared for Parliament stated as follows [1]:

> The provisions of the Taxes Management Act, 1880, in regard to the accounting by local collectors of taxes for the sums entrusted to them to collect, are in several respects incompatible with existing conditions and must necessarily be modified in consequence of:
>
> (*a*) the transfer of the Office of Collector of Inland Revenue by the Excise Transfer Order, 1909, and
>
> (*b*) the general adoption of the system of prompt payment of sums collected by the local collectors into accounts opened in the name of the Commissioners of Inland Revenue at the branches of various banks, for transmission through the head offices of those banks to the account of the Commissioners of Inland Revenue at the Bank of England.
>
> Clause 173 and the following clauses of the Bill, while departing from the provisions of the Taxes Management Act, 1880, in detail, retain the essential features of the scheme of accounting contemplated by that Act, and are in accordance with the practice followed in recent years in England and Wales.
>
> Part VII. of the Taxes Management Act, 1880, prescribed that the Commissioners of Inland Revenue might appoint days on which the collectors of Inland Revenue should hold "Receipts" at which the local collectors should submit to an investigation of their accounts by the said collectors of Inland Revenue and the Surveyors of Taxes, and pay over to the collectors of Inland Revenue any sums found to be due. The Commissioners of Inland Revenue were empowered to require the local collectors to make remittances weekly or otherwise in anticipation

[1] See Bill as ordered to be printed February 19, 1918, at p. 237.

of the " Receipts." The local collectors were required at or in connection with the " Receipts " to deliver " Schedules of Arrears," and at a subsequent date to furnish to the general commissioners " Schedules of Deficiencies " and such information as might be necessary to enable those commissioners to prepare their " Schedules of Discharge and Default " for transmission to the Commissioners of Inland Revenue.

The transfer of the Office of Collector of Inland Revenue to another department, and the general requirement of the Commissioners of Inland Revenue that local collectors should remit the sums collected by them by payment into official accounts at branch banks, have rendered " Receipts," in strict accordance with the terms of the Taxes Management Act, 1880, obsolete in practice, and all references to such " Receipts," under that name, have been omitted from the Bill. But their main object, of requiring a local collector to account to an officer of the Inland Revenue Department, has been maintained, both in practice and in the Bill, by preserving the functions which the surveyor of taxes would exercise at a " Receipt " and requiring a collector to furnish Schedules of Arrears to him, and submit to his investigation of the accounts, on a day appointed by the Commissioners of Inland Revenue, the surveyor seeing that the collector duly pays over any balance found to be due from him to the proper officer. Where a collector fails to do this, the surveyor is empowered to require the general commissioners to summon the collector to be examined by them in accordance with s. 116 (1) of the Taxes Management Act, 1880.

A technical defect in that section is remedied by Clause 174 of the Bill. Under the section the power of the general commissioners to summon collectors before them for examination was restricted to the case of collectors appointed by those commissioners. In practice they also examine, when necessary, collectors appointed by the Commissioners of Inland Revenue, and this practice is recognised by Clause 174 of the Bill as drafted.

The provisions of the Taxes Management Act, 1880, as to the preparation of Schedules of Arrears and Deficiencies by the collectors are obscure, and it is doubtful whether schedules prepared in strict accordance therewith would be sufficient to serve their purposes of :

(*a*) securing that the collector does not neglect his duties, and

(*b*) enabling the general commissioners to close the accounts by preparing schedules of all sums discharged or found to be irrecoverable locally.

The Bill accordingly makes it clear that the Schedule of Arrears must contain particulars of all sums included in the assessments, but not collected at the date of its delivery, and that the Schedule of Deficiencies must contain particulars of all sums discharged and all sums which ultimately prove to be irrecoverable locally, for whatever reason. There

can be no doubt that this was the intention of the Taxes Management Act, 1880, although the intention was not clearly expressed.

The provisions of the existing Acts as to accounting by collectors of taxes are not specifically restricted to England and Wales, but they are not and never have been fully adapted to the conditions obtaining in Scotland and Ireland. In both those countries, however, the collectors are under complete official control, being appointed in Scotland by the Treasury, and in Ireland by the special commissioners on the nomination of the Commissioners of Inland Revenue, and their procedure is regulated by administrative orders. The Bill leaves the present position unaffected in these respects.

The utmost care was taken to preserve the original language as far as possible. It has indeed been urged by some critics that in this respect the Act has been too conservative, and that a more drastic pruning of certain rather archaic phrases and the adoption of a more modern form of expression would have been advantageous. But it must be remembered that the Act concerns almost every member of the public, that the words of the old statutes have been weighed, pondered over, construed, and acted upon for many years by the taxpayer, the revenue authorities, and the Courts of law, and the last thing to be desired was a crop of arguments and litigation based upon the fact that an earlier Act used one expression and the consolidation Act used another. It cannot be doubted that the sagacity and experience of Lord Loreburn, the Chairman of the Parliamentary Committee, was most wisely exercised in discountenancing any tendency to depart from the actual wording of the statute law which the Bill was intended to reproduce. In one respect an alteration of the law, or perhaps a declaration of the existing law, was made in the final stages of the Bill. This amendment dealt with a curious point, and this point is so clearly and concisely stated in the report of the Committee that it cannot be better or more briefly put than in the exact words of their report.[1] The Committee say :

There is one point to which the Committee would call special attention. The question whether the exemption and abatement conferred by Clause 9 extends to persons other than individuals has been determined in the negative by the House of Lords in *Curtis* v. *The Old Monkland Conserva-*

[1] Report, 1918, No. 95, July 24, 1918.

tive Association, (1906) A.C. 86, as respects unincorporated bodies of persons, but has never been definitely determined as respects corporations. The Committee therefore thought it was incumbent on them to preserve any possible right that might exist. They were, however, confronted with the difficulty that if the word " person " *simpliciter* were used they would, having regard to the Interpretation Act, be deciding the case in favour of the taxpayer and against the Crown. They have therefore been constrained, in order to preserve the law unaltered, to define " person " in that clause as having the same meaning as it had in s. 163 of the Act of 1842.

The Committee feel that this reference back to the Act of 1842 and the uncertainty which the adoption of such a course engenders is much to be deprecated.

The ground of the decision in the above-named case, namely, that " person " in s. 163 is used in the primary sense of the term, would exclude corporate as well as unincorporated bodies of persons.

Moreover, since the decision above referred to the practice has always been to restrict the relief to the case of individuals.

As, therefore, the restriction of the relief to individuals would, the Committee believe, make no change in the law and would give effect to the undoubted intention of Parliament, they recommend that in the House of Commons those amendments should be made which they thought it beyond their province to make, declaring the law to be what they believe it to be, and what it has in practice been taken to be. Amendments necessary for the purpose are suggested in Appendix II.

These amendments were inserted in the House of Commons and the Act stands accordingly.

A curious and novel point arose in the course of the work. The Taxes Management Act, 1880, deals with income tax, land tax, and inhabited house duty. It was passed to embody a system of procedure in dealing with the collection of all these taxes. So far as regards income tax the provisions of that Act were of necessity included in the consolidation Bill. The Bill would have been insufferably incomplete without them. They were accordingly so included and the Taxes Management Act was repealed so far as it concerns income tax. It still applies to the other taxes. But then arose the difficulty that under the Taxes Management Act appointments were made, procedure was authorised, and penalties were imposed generally and collectively in relation to all three taxes and —to take an instance—a man might do something which was an offence both in relation to income tax and inhabited house duty.

Under the Act of 1880 that offence was a single offence ; when the Acts were separated he might be considered to have committed two offences, one under the Taxes Management Act in relation to inhabited house duty, and one under the Income Tax Act, 1918, in relation to income tax. Similarly, appointments made under the Act of 1880 were appointments in relation to all the Acts with which that statute was concerned. After the separation of income tax by the Act of 1918 it was arguable that separate appointments of the same person would have to be made in every case, one for income tax under the Act of 1918, and one for the taxes which remained within the purview of the Act of 1880. This difficulty was met by the ingenuity of the Parliamentary Counsel in s. 238 (*d*) of the Act of 1918, which, in effect, restores the position existing before the Act of 1918 was passed.

The Dominions and Colonies. Further Simplification of Income Tax.—Readers of this journal will naturally inquire how far the Act of 1918 will be useful as a model for the Dominions and Colonies. The personal opinion of the writer is frankly that it will be very little use at all. The great Dominions of the Crown have already their own statutes suitable to the conditions of the society for which they were passed. No statute depends so much on local conditions of business, administration, and collection as does an Act relating to Income Tax, and the enactments already passed with full knowledge of the statutes of the United Kingdom on this subject are not likely to feel the effect of an Act which, after all, does no more than reproduce those statutes in a manageable form. For the Crown Colonies the Act is much too long and much too complicated. To set up the machinery of assessment and the Courts of Divisional Commissioners which are found in Great Britain, but which as long ago as 1853 were found impossible of application to a country so close as Ireland, would be impracticable. The provisions of Schedule C, and probably also, in many cases, the provisions of Schedules A and B, would be found impossible of application. It must be admitted that such benefits as the Act of 1918 may confer will be confined to the United Kingdom. Whether income tax law as it stands in the Act of 1918 could be made simpler for this country is a question of some difficulty. No doubt it could, but in attempting the task the legislator is between the devil and the deep sea. The passing of a simpler Act would give rise to an

immense amount of litigation. The main principles of the present law are more or less settled, and the practitioner has often to ask himself little more than whether his circumstances bring him within this or that decided case. New principles, new phraseology, new methods, would require new adjustments, and the weary road from the assessor to the Divisional Commissioners and so on up to the House of Lords would be trodden by many a pilgrim whose pilgrimage would have to be undertaken, not of free will, but owing to the pressure of forces over which he had no control. In the meantime the new Act has provided in a simplified form one consistent statement of the whole law on the subject of Income Tax.

INFANT WELFARE LEGISLATION.

[*Contributed by* R. Newton Crane, Esq.]

An inquiry into the extent and character of the legislation in several countries, and particularly in the British Dominions and the United States of America, having for its object the protection of infant life, shows that in countries so widely separated as the Australian States and the Western States of America the same principles have actuated the legislators. Upon the theory that children are the capital of the State, they have recognised that it is the foremost duty of the State to preserve and increase its capital, and consequently to encourage mothers to bring healthy offspring into the world, and to assist them to rear their children to become desirable and useful citizens. It has therefore been the foremost care of the legislatures in a majority of the Dominions to provide nursing and medical attendance for expectant mothers, and to continue this care for a reasonable period after childbirth. The statistics in the newer countries agree with those in the Mother Country that a very large proportion of the deaths of infants occurs in the first days and weeks of their lives, and that this mortality can be prevented in a large measure by ensuring that the mother shall have the nursing and the care of her infant during this critical period. This mortality among newly-born children is disproportionately greater among illegitimates. Special provision has therefore been made to ensure that unmarried mothers shall have every possible care in the ante-natal period.

Paternity Proceedings.—In Western Australia, New South Wales, Victoria, Queensland, New Zealand, and many states in the United States and in the Scandinavian countries, notably Norway, provision is made that the expectant mother, or some one on her behalf, may make known her condition in the proper quarter, and shall be enabled to take paternity proceedings. While in

England an expectant mother may take out a summons against the alleged father of her child, such a summons may not be heard until after the birth of the child. This results in a denial of justice, as is illustrated by the fact that in 1913, the latest date for which any accurate figures are available, while 37,909 illegitimate children were born, only 6,914 affiliation orders were made. It would be greatly to the advantage both of the State and the mother, for economical as well as humanitarian reasons, if applications for affiliation orders could be made at the earliest possible moment, before the birth of the child, and that the proceedings in connection therewith should be heard in camera. It is reasonable to assume that in such circumstances the mother would be more likely to institute proceedings, realising that she would be saved from the exposure incident to her condition and that she would have a more sympathetic hearing. On the other hand, there would be a greater likelihood that evidence to establish her claim could be more readily secured at this stage, and that the defendant might be served before he had an opportunity of leaving the jurisdiction. It is also probable that the reputed father would admit paternity if the proceedings were in private and he was thereby convinced that he would avoid publicity, which, according to the common experience of those who are best acquainted with these proceedings, is the greatest incentive to deny the charge. In the countries above mentioned, the costs of these proceedings are borne by the State, on the theory that the State has an interest in the result of the application, as if an effective order is made against the father the State will thereby be relieved of the expense of the care of the mother and the infant. The principle that the State should undertake this expense is admitted in this country in the Affiliation Orders Act of July 31, 1914. By this Act a collector is appointed by the Court to collect, without charge to the mother, the sums payable under an affiliation order, the expense being defrayed from the fund out of which officials of the Court are paid.

The intervention of the State to secure the support of expectant mothers and their infants is the same with respect to both married and unmarried mothers, as all of the countries whose laws I have examined make provision for orders against husbands deserting their wives at this critical period, and to provide for the nurture

and rearing of the children. In most countries the basis of the award in cases of affiliation orders is the responsibility of the father, and there is no sum fixed in the statutes. This is left to the discretion of the Court, as in cases of applications by married mothers who have been deserted by their husbands. The means of the father and his ability to earn proper support for the expectant mother and the child are factors which the magistrate considers in making his award.

Queensland.—Foremost among the Acts passed to ensure the protection of infant life may be quoted that of Queensland, passed in 1905, particularly as it is typical of similar legislation in almost all of the States of Australia and in New Zealand. The Queensland Act embraces provisions for nursing homes, the adoption of infants, and the recovery against the father of confinement expenses in cases of illegitimate infants. The cost of the confinement expenses is limited to £10, and such expenses include reasonable medical and nursing fees, and the cost of board and lodging and clothing necessary for the child for two months after its birth. An order may be made and be enforced against the father before the birth of the child upon competent medical evidence of the woman's condition. In the absence of such evidence the order is not enforceable until after the birth of the child. The complaint or information may be made either by the mother herself, or on her behalf, or by the police authorities acting on their own motion. The provisions for the regulation of nursing homes are very stringent and are directed against " farming out " and similar abuses.

Victoria.—The elaborate Infant Life Protection Act, 1915, of Victoria provides, *inter alia*, that where an order has been made for the support of an infant, and the weekly payments fall into arrear for a period of four weeks at any one time, the infant in respect of whom such payments should have been made shall thereupon become, *ipso facto*, a ward of the Department established by the Act.

Norway.—The Norwegian Illegitimacy Law [1] of April 10, 1915, has attracted great interest in this country, as it contains some novel features. While it is generally recognised as a radical

[1] For a full account of this legislation see "The Children's Rights Laws and Maternity Insurance in Norway," by the Hon. J. Castberg, President of the Odelsting, *Jour. Comp. Leg.* (July 1916), vol. xvi. pp. 283 *et seq.*

measure, nevertheless the principles laid down in it are in the nature, it is claimed, of a return to some of those recognised in the early Folk Law of Norway, under which the illegitimate child had a qualified right of inheritance from the father and enjoyed substantially all the legal family rights of the legitimate child. These rights of the illegitimate child were abolished about the middle of the seventeenth century. The most radical change made by the new Norway legislation consists in putting the burden of establishing paternity and fixing the obligation of maintenance upon the State instead of upon the mother. The mother of an illegitimate child is required by law to report the facts to the local authorities, and it is made the duty of the Court to summon the alleged father to answer the charges. Further novel features in the law consist in (1) requiring the economic support to accord with the means of the better situated of the parents, and not with their average means; (2) extending maintenance until the child is sixteen, and in some cases even beyond that age; (3) equalising the burden of contribution by requiring contributions from the mother if circumstances of wealth justify that; (4) requiring the contribution of benefits to the mother for three months before confinement and also during confinement; (5) payment of special nursing expenses for nine months after birth if the child is with the mother, the law fixing certain minimum and maximum amounts for these contributions, and (6) forced collection of contributions on the initiative and at the expense of the State, and not that of the mother.

Missouri.—The State of Missouri, as recently as April 1917, passed an Act to provide for the support of needy mothers with dependent children, and of women about to become mothers. This follows the line, and in some respects extends the principle, of what are known in the United States as "Mothers' Acts." These have become so popular that they have been enacted in no fewer than thirty-four States. The amount of the allowance is fixed at £3 3*s*. a month where the mother has only one child, and not less than 32*s*. a month for each additional child, provided that in no case shall a larger allowance than £8 a month be made, and it is expressly stated that the benefits of the Act shall be extended in order to enable a mother to nurse her child, and to care for it in her own home.

The Education of Expectant Mothers.—In the United States generally a concerted movement has been made by the various States for the education of expectant mothers in order to acquaint them with methods of the kind of care they should exercise in order to prepare them for confinement and as to their duties after the infant has been born. A Bill was introduced in the Senate of the United States in June 1918, having for its purpose the encouragement of instruction in the hygiene of maternity and infancy, and to extend the proper care for maternity and infancy, and to provide for the co-operation of the several States in the promotion of such instruction and care in rural districts. The Children's Bureau of the Department of Labour under the direction of its Chief, Miss Julia C. Lathrop, has prepared and circulated gratuitously in all parts of the country pamphlets dealing with this subject. These publications, which are greatly sought after, are divided into series, such as the care of children, infant mortality, rural child welfare, and the legal series which covers the laws with respect to the subject. As an illustration, the pamphlet dealing with Maternal Mortality embraces not only the statistics with respect to the United States, but all other countries. It reveals the significant fact that in the United States the average death-rate from purulent infection and septicemia, which in 1901 to 1905 was 6·1 per 100,000 population, fell in 1906 to 1910 to 3·8, and then decreased steadily, being 2·8 in 1913. In the same way the death-rate from simple peritonitis, which was 10·8 in the period 1901 to 1905, fell to 6·1 in 1906 to 1910, and to 2·7 in 1913. These results are evidently due to the educational propaganda which has been so energetically carried forward by the Children's Bureau.

Preventive Legislation.—The various States, as distinguished from the Federal Government, have endeavoured for some years past, in response to public demand, to lessen the death-rate among children, and to increase the birth-rate of healthy infants by providing restraints upon the spread of tuberculosis and venereal and other communicable diseases. The recent law of Indiana for the prevention and control of tuberculosis is an illustration of this type of preventive and curative measure. The State has declared by statute tuberculosis to be infectious and communicable and dangerous to the public health. Every practising physician is required, within five days after the fact comes to his knowledge,

to report the name and address of every person known by him to be infected with tuberculosis. The Chief Officer having charge of any hospital, dispensary, or private or public institution and every school physician is obliged to report the name, age, sex, occupation, place where employed, and the home address of every person under his care having tuberculosis. These reports must be transmitted to the State Board of Health, whose officials are required to investigate the prevalent cases and the distribution of the disease, and the ways and means for restricting and controlling it. The results of these investigations are required to be publicly and gratuitously distributed throughout the State for the enlightenment of the people as to the prevalence and dangers of the disease and the best methods for its prevention and cure.

Marriage of the Unfit.—A number of States have enacted laws which forbid the granting of marriage licences to persons of tainted blood, or the feeble-minded or epileptics, or those affected with tuberculosis and venereal diseases.

Minnesota.— Minnesota has a law providing that no woman under the age of forty-five, or a man of any age, except he marry a woman over forty-five, either of whom is epileptic, imbecile, feeble-minded or afflicted with insanity, shall intermarry or marry any other person within the bounds of the State. Similar laws have been passed in Michigan, Delaware, Connecticut, New Jersey, and North Dakota.

Wisconsin. — An Act of the Wisconsin legislature passed in 1913 to prevent the marriage of a person affected with a venereal disease, by requiring all applicants for a marriage licence to produce a physician's certificate of freedom from the disease, evoked ridicule and protest, and led to litigation to determine the constitutionality of the regulation. The measure, however, survived the ridicule, and overcame the protest against it, and, as amended last year, is now pronounced by the State Health Officer of that State to be very satisfactory in its operation. This official asserts that it has prevented the marriage of a considerable number of people infected with venereal disease in a communicable form, and that opposition to it has disappeared. He further states that men from adjoining States, contemplating marriage, have resorted to Wisconsin in order to comply with the requirements as to examination. It is claimed that the education of the public in regard

to the dangers, to meet which the law was passed, is one of the chief benefits of the law.

New York.—In 1918 a law was enacted in New York which requires each party to an application for a marriage licence to lodge with the authorities an affidavit, in a prescribed form, to the effect that he or she has never knowingly been infected with any venereal disease or, if so infected within a period of five years from the time of the application, has since had a laboratory test of the blood which has demonstrated freedom from such infection.

New Jersey.—New Jersey has gone further and made either marriage or intercourse by any person knowing himself or herself infected with a venereal disease a misdemeanour punishable by heavy fine or imprisonment, or both.

It is, however, recognised that prevention of marriage does not prevent the birth of disease-infected children or children of impaired vitality, incapable of surviving the period of greatest liability to infant mortality.

Sterilisation.—The laws restricting the granting of marriage licences to healthy people alone are strongly opposed by those who appreciate the danger from this source of illegitimacy, particularly among the feeble-minded and the wastrels of the community, who are subject to no self-imposed moral restraint. This has led to the rapid growth of a sentiment in favour of some form of sterilisation of the insane, the epileptic, the imbecile, those tainted with ineradicable communicable diseases, the sexual perverts, and habitual criminals. Statistics in the United States conclusively prove that this class of degenerates is multiplying out of all proportion to the increase of the general population. Year after year in every State renewed demands are being made for grants of the public funds for the enlargements of the institutions for the housing and care and segregation of such persons. The argument of those who advocate sterilisation is based upon the assertion that degeneration is a defect, and that a defect differs from a disease in that it cannot be cured.

Indiana.—In 1907 a law was passed in Indiana, the first of its kind in the history of the United States, making it the duty of officials of certain State institutions to examine the inmates under their care to ascertain their mental and moral condition, their personal records and their family traits and histories, and granting

to them the right to perform an asexual operation where, in their discretion, it would be to the benefit of the subject and the community at large. Such operations had been performed by consent in the Kansas Feeble-minded Institution as far back as twenty years ago, when forty-eight boys were operated upon by consent, and in Indiana Dr. H. C. Sharp, the physician of the Indiana Reformatory, to whose exertions the passage of this first law is mainly due, had, prior to its passage, been performing the operation also by consent. In this way he had treated 236 cases with entire success. The results in Indiana have led to no fewer than twenty-two different States passing a sterilisation law, such Acts having found their place upon the statute books of Oregon, Kansas, South Dakota, and California within the past year. In Washington and Nevada the law is purely punitive, being applied to rapists and criminals guilty of sexual offences, but in the other States the object of the law is to protect future generations and in this regard may be considered purely eugenical in its motives.

Constitutionality of Legislation in United States.—Naturally these laws have provoked opposition which has led to their consideration by the Courts in six States. In Iowa it was held that the statute constituted a "Bill of Attainder"; whereupon the legislature re-enacted the law, so framing its provisions as to escape the consequence of this judgment. In Washington, New York, and New Jersey the law was held to be unconstitutional on the technical ground that it constituted "class legislation." In no case has a judgment been pronounced against the Bill on its merits, and in nearly every case where the Courts have pronounced the Act void it has been repassed, as in Iowa, in such form as to enable it to comply with constitutional provisions. Thus also in some States where the law was vetoed by the Governor, it has been re-enacted by the legislature.

Results of Legislation.—Difficulty has been experienced in ascertaining the results of this class of legislation. The law provides in nearly every instance that after the operation has been performed, a report of the fact of the operation and the results of the observations on the health and condition of the person who has been operated upon, shall be transmitted at stated periods to the Governor of the State. Naturally these reports are confidential and are therefore not accessible to the public. But from inquiries it has been possible

to ascertain that the total number of operations slightly exceeds 2,000, taking all the States together.

Dr. John Randolph Haynes, of Los Angeles, California, has obtained recently information from the physicians in charge of the insane asylums, prisons, and reformatories in California as to the working of the Act in that State. There are six insane asylums and one institution for the feeble-minded in California, and it is in these institutions that 1,697 operations had been performed up to August 27, 1918. About one-fourth of the persons so treated were women. In the case of reform schools, the law does not provide for or permit sterilisation, but feeble-minded children for whom the operation is desirable are sent to one of the larger institutions for the benefit of operation there.

It is not possible to express more than a general opinion upon the results of these laws of the United States for the protection of the community, to ensure that mothers shall be protected in order to enable them to beget healthy offspring, and to prevent the increasing birth-rate of children liable to swell the figures of the infantile death-rate. But there seems to be a general consensus of opinion that the laws in favour of sterilisation are beneficent in their character and of great benefit to the persons operated upon, and of still greater advantage to the general community.

COMPULSORY PURCHASE OF LAND.

[*Contributed by* J. H. Balfour Browne, Esq., K.C.]

In education, although in the beginning parents educate their children, in the end parents have much to learn from those whom they formerly taught; and so it is that while an old country teaches its colonies to begin with, in the long run the younger countries set important examples to their Mother- or Father-land. Thus it was that many of our Colonies adopted the Lands Clauses Act for the purposes of the compulsory acquisition of land for what are called public purposes, and many of them have later adopted more drastic methods of expropriation, and now in the reports of the Committee appointed by the Ministry of Reconstruction to deal with the law and practice relating to the acquisition and valuation of land for public purposes, we have the Committee's statement that the Code embodied in the Lands Clauses Acts for the valuation and assessment of compensation for property compulsorily acquired is no longer satisfactory, and we have various suggestions for the alteration of the law as to the granting to public authorities exercising public functions and persons and companies carrying on great enterprises of public importance the authority to take lands, but also as to the principles on which and the methods by which land so required is to be acquired and paid for.[1]

Changes in the Conception of Private Property.—The fact is that there is a great change in the last sixty or seventy years in public opinion in relation to the institution called Private Property. In the old time property in land was regarded as a sacred right, and that right could only be abrogated by the supreme power of the legislature and that only after proof that the owner was to be ousted on the ground of public necessity or public interest, and

[1] It is true the terms of reference to some extent guided the findings of the Committee, for it was asked to report on "the defects of the existing system" and to "recommend changes that may be desirable."

even then only after full compensation had been paid to him for the property taken and the injury caused by the acts of the promoters. But in the United States the principle of "eminent domain" enables possession of land required for any purpose of public importance (a very elastic phrase) to be obtained without difficulty and within a few weeks. In Australia and Canada land can be "resumed" by the Crown for so-called "public purposes" by a simple system of *Gazette* notification and upon compensation, while in the Australian Colonies "since the beginning of this century a series of Acts have been passed extending this system to the acquisition of land for every kind of public purpose" such as public offices, hospitals, asylums, libraries, mechanical institutions, schools of art, bathing places, quarries, etc. In these States, private bill legislation seems to be a thing of the past, and even the Lands Clauses Acts are a dead letter. Here, as we see, it is proposed to substitute for the old Code a "simple, quick and economical system for the acquisition of land" and to repeal the old Acts which have done service so long. It is obvious that, although we may not have arrived at the opinion that "private property is theft," we no longer entertain the same views with reference to the ownership of land that our ancestors did; and have, rightly or wrongly, a much more extended view of what constitutes a "public purpose."

The Present Need.—The question has been raised by the Ministry of Reconstruction now, because it is thought that when peace is established there will be—in relation to forestry, housing and a great number of other large projects—a necessity for the acquisition either by local or central authorities of many lands, and as these will be the purchasing authorities, they naturally desire to purchase as cheaply as they can; and as quick and simple methods are an important element in the cost, they desire to get rid of the present expensive methods of private bill legislation and of the assessment of the value of and compensation for land taken under the Lands Clauses Acts.

The Method of Authorisation of Expropriation.—With regard to the authorisation of the expropriation it is said that the present system of Bills in Parliament, or even of what is thought to be the cheaper method of procedure by provisional order, is expensive and unsatisfactory, and Mr. Leslie Scott's Committee propose to set up a sanctioning authority (very like that which exists under the

Scottish Private Legislation Procedure Act, 1899), which is to be a "Sub-committee of Parliament with co-opted members." The sanctioning authority is to dispose of all the questions which are at present dealt with by Private Bill Committees of the two Houses. It is to have a paid chairman, and its decisions—which will in most cases involve the compulsory acquisition of land—are to be final, except on "any question of policy (*i.e.* principle)," in which case there is to be a right of appeal to any Government Department and to other promoters or opponents with the consent of the Chief Commissioner, the Lord Chairman of Committees, and the Chairman of Ways and Means. Here possibly there is some confusion of thought. Every matter that required the sanction of Parliament was regarded as a question of policy, or principle. Thus the construction of a railway which could only be made on land acquired—which land could only be purchased at a reasonable price under compulsory powers—was always and always will be a matter of policy. It is quite true that the promoters of the railway were, as Lord Selborne in his letter on behalf of the Agricultural Policy Sub-Committee in regard to Land Acquisition, which is printed as an appendix to the report of Mr. Leslie Scott's Committee—and which is to a large extent the foundation of that report—points out, expecting to make a profit out of their undertaking[1]; but they had to lay before Parliament a public case before the Legislature would endow these private persons with power to purchase land, construct works, charge tolls, make bye-laws, etc. It was a question whether policy, *e.g.* the general convenience of a travelling or trading community, made it expedient to give to the promoting company powers to take land by compulsion, or whether a man who held his land under a state guarantee of quiet possession should be made to give it up. In those days many so-called public duties were entrusted to private persons and companies. In that respect there has been a change of policy. Roads and bridges are now in the hands of public authorities. Water works, gas works, electricity undertakings which were formerly undertaken by private companies are for the most part now in the hands of local authorities, and

[1] A Government Department or local authority in promoting a Bill had in view the advantage which would accrue to the general or local public by the undertaking and in many cases, where the acquisition of gas or water works was involved, looked to a direct profit from the undertaking purchased.

the announcement has been made that it is the policy of the Government to nationalise railways.

But here we have the proposed change in reference to the granting of compulsory powers for the purchase of land—and it is obvious that the change proposed is not a great one, and will do very little to make the acquisition of parliamentary powers as inexpensive as they ought to be. The Committee propose that the inquiry should be transferred from a Committee of one House (the number of Bills that had to pass through Committees of the two Houses was small) and should be referred to a Sub-Committee of Parliament with some outside members on it, but with an appeal to Parliament. Still the proposal is a much more reasonable one than we might have expected when we see what has been done in similar cases. by some of the Dominions.

The Basis of Valuation.—In their second report the Committee deal with the process of the acquisition of land after the sanction of Parliament has been obtained, and it is here that they propose to substitute a new Code for the Lands Clauses Acts. Here too they rightly desire, if they can, to make the acquisition cheap, simple, and quick, and to effect their purpose they propose changes in the basis of valuation, the assessment tribunal, and deal with matters to be taken into consideration as relevant to the assessment. The first of these is by far the most important. At the present time the basis of valuation is the value of property *to the owner*. It is the owner who has to be compensated, and the only way to compensate him is to find out what the property that was taken was worth *to him*. But the Committee recommend that the basis should not be the value to him, but the market value as between a willing buyer and a willing seller. It does seem a little odd to propose a basis which has no existence in fact. It is true the purchaser is willing, nay anxious, to buy; but the man who is made to sell is not willing, and has to be compelled to part with his land for the purposes of an undertaking which is supposed to be of public importance. To call him a "willing seller" for the purpose of arriving at a basis of valuation is to introduce a fiction. It is obvious that the question of the basis is an important one, and that no basis which is unjust will succeed as a satisfactory solution of the problem. Of course the cheapest method of acquiring land would be to expropriate without compensation; but although many

persons in these days who look upon "property as theft" would approve of such a method of acquiring land for public purposes, the Committee do not advocate confiscation. Still, their basis of valuation is a bad one. If you have to compensate A for parting with his property, you must ascertain the loss and injury to him, and not to some one else. The value the land may have to the promoters would of course be an impossible basis; the value "in the market" may give the owner either too much or too little for his land. In the case of *Stibbing* v. *The Metropolitan Board of Works*[1] the seller, a rector, had a graveyard which had been closed, and which really was of no value to him owing to the restrictions under which it was held. The value to that owner was practically nil, but the land in the market and between a willing seller and willing buyer would have had great value. One of the objections to the allowance of compensation for what is called "special adaptability" is that it is an indirect method of considering the value of the land taken, not to the owner, but to the purchaser, who had to procure statutory powers to construct, say, his reservoir or some other public work. One acute critic, Mr. Eustace Hills, in a paper which he read before the Surveyors' Institution, saw that as it stood the basis proposed by the Committee was unjust, and suggested that to make up for this fault in the basis of valuation the allowance of 10 per cent., which was said to be given for the compulsory sale, should still be given as an addition to the market value to the owner. But the Committee in their desire for cheapness will have none of it, and wish to abolish any allowance—we take it even an allowance for reinvestment—beyond the market value.

It is not our wish to criticise the report here, but only to show what it contains, and, if possible, to compare its recommendations with some of the law and practice in other countries. But here, unfortunately, the report does not help us, and most of us are not informed how in the United States or the British Dominions the question of compensation which follows "resumption" of land for public purposes is determined.

The Assessing Tribunal.—Under the Lands Clauses Act there were four methods of determining the question of disputed compensation: (1) justices; (2) surveyor appointed by justices; (3) arbitration; and (4) a jury. Many persons to-day hold very strongly that there

[1] L.R. 6 Q.B. 37.

should be expert knowledge on the bench of the tribunal as to the subject-matter which it is called upon to determine. In the Admiralty Division, naval assessors help the judge. On the Railway Commission two members of the Court are appointed apparently because they are supposed to have knowledge of railways and railway traffic. How far this is to go is an important question. In our ordinary courts in a question which turns upon medical testimony or engineering opinion, it has not, up to the present time, been thought necessary to have recourse to a medical judge or an engineering expert. The Committee, however, think that the one tribunal for determining the price to be paid or the compensation to be made for land taken should consist of independent arbitrators selected from a panel of experts, whose decision should be final upon questions of fact, but from whose decision there should be an appeal upon questions of law. But whether this is wise or not many of the suggestions as to the assessing tribunal will be of considerable use. The old arbitrations, when there were two arbitrators and an umpire or oversman, were cumbrous, expensive, and useless. The arbitrators were only two advocates who addressed and possibly gave evidence to the umpire in private instead of in public.

Betterment.—There are some other important matters in the report. The Committee deal with the question of betterment. There are two aspects in which this question presents itself. When a man's property is taken and some work is carried out on it by which the remainder of his property is clearly and immediately enhanced in value, it is a reasonable thing that a debtor and creditor account should be made out between him and the promoters—to discover how much he has lost by the taking of the land and the severance, and how much he has gained by the carrying out of the particular undertaking. There seems to be no injustice in such an assessment. Indeed when accommodation works have been carried out or may be ordered for the convenience of the adjoining lands of the owner, it would be grossly unfair that these should not be considered in assessing the compensation to be paid for severance, or, as the Committee prefer to call it, "injurious affecting."

But there is another aspect of betterment which raises more difficult questions. The principle defined in the first report of the Royal Commission on the Housing of the Working Classes presented in 1885 was that "rates should be levied in a higher measure upon

the property which derives a distinct and direct advantage from the improvement instead of upon the community generally, who have only the advantage of the amelioration of the health of the district." This principle goes much further than the "set-off" of the improvement of a particular owner's property against the damage done to such owner by severance or "injurious affecting."

It is indeed an attempt to secure for the benefit of the community, through the promoters, the unearned increment accruing to the particular lands in consequence of the construction of works of public importance. Of course if there is to be appropriation by promoters of the increased value of properties which are not taken, but which are advantageously affected by the works, there ought to be payment made by the promoters to owners whose property is prejudiced in value by the undertaking.[1] This principle of betterment is quite an old one. In the Act for the rebuilding of London after the Great Fire [2] there is a provision that the owners of houses and lands "meliorated" by the new street to be made shall be assessed for the cost of the land necessary to carry out the widening. In the United States, too, two hundred years ago power was given to a Highway Board in the Colony of New York for the purpose of making public roads to impose such an assessment, and the principle seems later to have been adopted in other States—in Kentucky in 1840, Maryland in 1845, New Jersey in 1857, and later still in some other States.

In this country the idea that the promoters could set off against the owner's claim the fact that his remaining land had been enhanced by the works constructed was ruled out in the case of *Senior* v. *Metropolitan Railway Company* in 1863.[3] The betterment clause, however, has since then found its way into many Acts of Parliament, and as this report points out, if the promoters are to pay for the "worsement" of land, it seems only fair that they should benefit by securing at least a portion of the betterment which is caused by their undertaking. There is one difficulty which seems, however, to have been overlooked. When the works are carried out by the Government or by a local authority, then the imposition of the

[1] It is admitted that if "betterment" is allowed, "worsement" must be compensated. But would this principle admit of a claim by railway company A against railway company B for deprivation of traffic by competition?

[2] 18 & 19 Car. II. c. 8, s. 26. [3] 32 L.J.Ex. 225.

betterment charge or rate would be in the hands of the taxing or rating authority. But as it is contemplated that public works in the hands of private companies or persons may be sanctioned—and I cannot myself see the distinction between a public work like a small railway and a great sale and distribution emporium like some of our great shops—it is a little difficult to see that it would be wise to confer taxing or rating powers over a certain area upon those private companies or persons. Of course, too, it must be remembered that, while it may be difficult, it is possible, with fair accuracy to arrive at the value of a particular price of land taken, it will always be difficult, if not impossible, by speculative inference to arrive at the benefit conferred or the detriment caused, and caused only, by the work in question, in the scheduled area.

Recoupment. — With recoupment, or the principle that the promoting authority or company may be allowed to purchase more land than they require for the construction of their works, so as to recoup themselves by resale for the cost of construction, the Committee have to begin with no sympathy, for they point out that it is not desirable to encourage undertakers to embark in land speculation. But in the end the Committee seem to think that while trading companies and local authorities should not be allowed to become land speculators for the sake of profit, they might be allowed to acquire land with the object of reinstating owners who had been displaced by the operations under the Act. But even that opens a little way a dangerous door.[1]

Special Adaptability.—In reference to the much-argued question of " Special Adaptability " the Committee, with a slightly dissentient note in an appendix, have something useful to say. Of course the value of land, whether it is taken on the basis of the value to the owner or the market value, depends not merely upon its present but on its prospective uses. Thus if agricultural land is so near a town as to make it probable that it will shortly be building land, that prospective value must be taken into account. And so it is with regard to any other prospective value which may be in the land taken. It has been held, therefore, that if land has a special

[1] Land grants in connection with Canadian and American railways, where but for the grants the " roads " could not have been constructed, have often been made, but such action is not an example which could be profitably followed in an old country.

value for reservoir purposes that value should be taken into consideration when making the assessment. But in such a case, although the land might in itself be suitable for the purpose, it could not be used for a reservoir, and therefore has not the prospective value in it, until an Act of Parliament is passed to enable the land to be taken and the works to be constructed. The Committee came to the conclusion that under such circumstances the claimed prospective value should be excluded. If it is included, as it was in the *Countess Ossalinski's* case [1] and in others, then you are not only trying to arrive at the demand for the land which gives it value, but adding to the market value something which is given to it by the Act—and to which the owner is not entitled. In the cases that have come before arbitrators and the Courts in the past, it has been invariably found that the claim for special adaptability was buttressed by the argument that the promoters had shown it to be "specially adaptable" by taking it, and in that way, although indirectly, the value to the purchaser was really being considered—contrary to sound principle and law.[2] We think here the Committee have arrived at a sound conclusion.

If space permitted there are many other interesting and important matters in connection with the acquisition and valuation of land raised by these two reports which might receive consideration. Together—whether we agree with all the Committee's conclusions or not—they are very valuable contributions to the literature of a difficult and obscure subject.

[1] Balfour Browne and Allan, *Law of Compensation*, p. 659.

[2] There is a note to paragraph 8 of the report which refers to a "Birkenhead case" where on the arbitration on a claim for "special adaptability" £26,518 was awarded for part of an estate, the whole of which had been purchased not long before for £9,171.

THE LAW OF CIVIL AERIAL TRANSPORT.

[*Contributed by* H. D. HAZELTINE, ESQ., LL.D., *Downing Professor of Law in the University of Cambridge.*]

Reports of the Civil Aerial Transport Committee.—The Reports of the Civil Aerial Transport Committee recently presented to the Air Council [Cd. 9218] form a valuable contribution to the study of the technical, commercial, and legal problems connected with aviation. In the present article attention will be restricted to those portions of the Reports which deal with legal problems. Especially important are the observations and recommendations of the Main Committee and of Special Committee No. 1. Under the terms of reference the latter Committee was directed—

> to advise as to policy and necessary legislation, with special reference to (1) the attitude to be adopted by the state with regard to national sovereignty in the air and international questions connected with aerial transport; (2) the question of state ownership (if any) or of necessary state control and regulations as to customs, quarantine, and aliens; (3) necessary amendments of the common and statute law as to the airspace covering private property and as to compulsory purchase of land for aerodromes and landing grounds; (4) the principles of liability for damage caused by or to aircraft.

The appendices to the Report of Special Committee No. 1 contain (1) the text of the International Convention in regard to Aerial Navigation which was drafted by the Conference of Powers held at Paris in 1910, together with the observations and recommendations of the Sub-Committee of the Committee of Imperial Defence and of Special Committee No. 1 of the Civil Aerial Transport Committee; (2) the draft of a Bill for the Regulation of Aerial Navigation prepared by the Home Office in 1911, together with the recommendations of Special Committee No. 1 as to drafting amendments. Owing to the vast range of the legal problems thus considered in

the Reports and appendices it will be impossible to do more than single out a few special topics for comment or criticism.

The Aerial Sovereignty of States.—Before the present war there was universal agreement among jurists that all the air-spaces above the high seas are as free and open to the aerial navigation of all nations as the high seas are free and open to their maritime navigation; but there was much diversity of opinion concerning the juridical character of the air-spaces above the territories and territorial waters of states. Lawyers were divided into two main schools of thought—those who held that the state is sovereign in all its airspaces, and those who maintained that the airspaces above states are as free and open to the aerial navigation of all nations as are the airspaces above the high seas.[1] A controversy thus arose which may be compared with the famous conflict between the defenders of maritime sovereignty and the advocates of the freedom of the seas in the days of Selden and Grotius. The earlier conflict resulted in the establishment of the freedom of the seas as a fundamental principle of international law. The more recent controversy has already ended in victory for those who have insisted upon the maintenance of the doctrine of aerial sovereignty. This doctrine is based not only upon the long-established practice of states, but also upon sound juridical principles. The events of the war have demonstrated the necessity for a rigid adherence to the sovereignty doctrine; for the adoption of the view that the airspace above states is as free and open as are the high seas would gravely imperil the safety and welfare of the states themselves. It is believed that the maintenanceof the doctrine of aerial sovereignty will not only protect the interests of states, but will also further all legitimate interests of international aerial navigation.

The recommendation of the Civil Aerial Transport Committee that the doctrine of aerial sovereignty *usque ad cœlum* be made the basis of international conventions and municipal legislation is, therefore, in line with historical development and sound policy. Especially important is the view expressed by the Committee that the sovereignty of the state should be held to extend to airspaces over territorial waters as well as to those over land territory. In

[1] For details in regard to the various theories advanced by lawyers in the leading countries of the world, see the present writer's *Law of the Air* (1911), pp. 6–53, 136–44.

view of the fact that aerial frontiers are imaginary vertical lines and offer no natural resistance to the entry of aircraft from abroad, the airspaces above territorial waters should be subject to state sovereignty no less than the airspaces above the adjoining land territories. Both classes of airspace should be subjected to the same legal *régime*, namely, the control of the state, subject to any future conventionary rights accorded to foreign states and their subjects.

If amended in accordance with the recommendation of Special Committee No. 1, the preamble to the draft Bill for the Regulation of Aerial Navigation would read as follows:

> Whereas the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto:
>
> And whereas it is expedient to control and regulate the navigation of aircraft, whether British or foreign, within the limits of such jurisdiction, and in the case of British aircraft to regulate the navigation thereof both within the limits of such jurisdiction and elsewhere:
>
> Be it enacted, etc.

The preamble in this form admirably expresses the doctrine of full and absolute sovereignty. If embodied in the Act it will dispel, so far as the British Empire is concerned, the miasma created by the "freedom of the air" theorists.

That the Committee is not disposed to impair the full force and effect of the doctrine of aerial sovereignty by treaty arrangements is apparent from a study of the draft international convention as amended by the Committee. The amended convention is framed on the assumption that each contracting state is sovereign in all its territorial airspaces. The rights accorded by each contracting state to the others, such as, for example, the permission that aircraft possessing their nationality may fly within its airspace, do not impair the principle of sovereignty. The rights which each state concedes to the others are contract or conventionary rights which exist only so long as the convention remains in force. The Committee's recommendations as to the terms of the Bill and the convention are a complete answer to those advocates of the "freedom of the air" who, before the war, maintained that only on the freedom theory

would it be possible to establish international aerial navigation. The recognition of sovereignty as the foundation of aerial legislation and of conventionary arrangements prepares the way for the opening of territorial airspaces to peaceful and legitimate flight of an international character ; for the self-interest of each sovereign state will lead it to enter into international conventions and to shape its own legislation with this object in view. This is clearly one of the main policies proposed by the Civil Aerial Transport Committee as the basis of British negotiation with other states. The same attitude is manifesting itself in all countries interested in the development of civil and commercial aviation.

The International Convention in regard to Aerial Navigation.— It is obvious that the fundamental legal principles in regard to international civil and commercial flight must be embodied in a convention and that these principles must be supplemented by the municipal legislation of all the contracting states. The draft convention of 1910, as amended by Special Committee No. 1, embodies several main principles, each one of which deserves careful study. Certain of these principles follow the analogy of the rules of maritime law in regard to ships.

The maritime laws of the world, both international and municipal, draw a sharp line of distinction between public and private ships. The legal importance of this distinction may be illustrated by the rules in regard to such matters as exterritoriality, visit and search, capture at sea, and the conversion of merchantmen into war-vessels. It is apparent, on reflection, that aerial law must draw a like distinction between public and private aircraft ; and the draft convention is framed on the basis of this distinction. The chief difficulty lies in the formulation of the criteria by which the public and private character of aircraft shall be determined. The test of public character adopted by the Paris Conference of 1910, and now approved by Special Committee No. 1, is embodied in Art. 40 of the draft convention, which provides that " public aircraft are the aircraft employed in the service of a contracting state, and placed under the orders of a duly commissioned official of that state." The draft convention provides for only two kinds of public aircraft, namely, military and police aircraft. " Police aircraft," declares Art. 47, " are public aircraft employed in the service of the police, especially that of the departments of public safety, public health,

and customs." In the present stage of development it is impossible to determine in advance the precise limits of the scope of state activity in regulating aerial navigation; but it is possible that the state may deem it desirable or even necessary to employ public aircraft for postal, pilotage, meteorological and other purposes not to be brought within the terms "military" and "police." In any event the definition of public aircraft contained in Art. 40 is sufficiently broad to include all aircraft engaged in public service.

Two observations may be made upon this definition. In the first place, aircraft owned by private individuals, partnerships, and companies may be deemed, under the definition, to be public aircraft, if they are "employed in the service of the state and placed under the orders of a duly commissioned official of the state." It follows, in the second place, that vast numbers of private aircraft may, under the terms of the definition, be speedily converted into public aircraft by the simple expedient of placing them under the orders of duly commissioned state officials and using them in state service. In the event of war all the private aircraft which possess a state's nationality may thus be converted over-night into military aircraft.

The second principle embodied in the draft convention, and approved by Special Committee No. 1, is that of the nationality of aircraft. There is general agreement among jurists that aircraft, on the analogy of ships, ought to be invested with nationality. In the case of public aircraft no difficulty arises, for all public aircraft, whether they be military or non-military, will possess the nationality of the state which invests them with the character of public aircraft. In the case of private aircraft, however, the problem of nationality presents real difficulties, for private aircraft invested with the nationality of a state will be entitled to fly the flag of such state and to receive its diplomatic protection; while at the same time such private aircraft will be subject to the laws of the flag state, wherever it may be, whether over the high seas or in the territorial airspace of foreign states, and it will also be liable to requisition by the flag state. All of these legal results of the nationality of aircraft make it necessary to adopt some test of nationality which shall protect equally the interests of aerial navigators and of the state.

The draft convention embodies two tests of the nationality of aircraft; and to all seeming these tests are not mutually exclusive one of the other. Under the terms of the draft convention any

contracting state would seem to be entitled to adopt either one or the other, or both, of the tests proposed. The first of these tests is the nationality of the owner, the second is the domicile of the owner within the state conferring nationality on his aircraft. The first test follows the analogy of the nationality of British ships under the Merchant Shipping Act and is the one recommended by Special Committee No. 1 as the sole test of British aircraft.

Any future legislation as to the nationality of aircraft (declare the Committee) should provide that British nationality should be taken to mean ownership by British subjects or by corporate bodies registered in the United Kingdom or in some part of His Majesty's Dominions, the effective control of which for all purposes is vested in British subjects.

In every aspect not only of legal principle, but also of national and imperial policy, this view is sound and should be incorporated in British legislation. The adoption of the second criterion would mean that aircraft of domiciled aliens would be entitled to fly the British flag and to receive British diplomatic protection. This situation might well lead to grave difficulties in practice, such as conflicts of interest between the state of the owner's nationality and the state of his aircraft's nationality. For this reason alone the second test ought not to be embodied in British legislation.

The third principle contained in the draft convention, and approved by Special Committee No. 1, is that of the registration of aircraft. It is contemplated by the framers of the convention that each state shall provide in its own legislation for the registration of all private aircraft which possess its nationality. Special Committee No. 1 recommend that, following the precedent of the Merchant Shipping Act, 1894, the new Aerial Navigation Act should expressly provide for local registration in the various British possessions.

In addition to provisions concerning the distinction between public and private aircraft and the nationality and registration of private aircraft, the draft convention contains rules in regard to the issue of certificates of the navigability or airworthiness of aircraft and also licences of capability to be granted to pilots and mechanics. It also embodies the rules of aerial traffic, including those in regard to lights, audible signals, and right of way. The "rules of the road," especially those designed to prevent collisions in the air, are of great interest and importance.

The detailed provisions as to the possibilities of collision which were framed at the Paris Conference of 1910 closely resemble the regulations for preventing collisions between aircraft which were drafted by the Royal Aero Club in 1912 and which are now in force in the United Kingdom. Special Committee No. 1 are of the opinion that these rules of the Royal Aero Club should be adopted as the basis of the collision rules in any future convention. They suggest, however, that the two following rules dealing with the possibility of collision between flying machines and airships should be added: (1) a flying machine must always keep at a distance of at least 200 metres in every direction from an airship; (2) flying machines must always make way for airships and free balloons, and airships must always make way for free balloons.

It is universally admitted that the airspaces above the high seas and unoccupied territories are free and open to the aerial navigation of all nations. The adoption by convention of the fundamental principles and rules which have just been outlined will establish in these free and open airspaces a certain legal order or *régime* comparable to that which now exists, by international custom and convention, upon the high seas themselves. But in order to legalise international flight within the territorial airspaces of sovereign states it will be necessary to embody in the future convention certain additional principles. One of the most important of these will concern the crossing of the aerial frontiers of states by the public and private aircraft of foreign states.

At the present time foreign aircraft possess no right of innocent passage and no right to land. For many reasons it is inadvisable in the present stage of aeronautical development for sovereign states to concede, by international convention, a right of innocent passage on the analogy of the right of innocent passage which foreign vessels now possess, by customary international law, in the territorial waters of states. The right to be accorded to foreign private aircraft should be of a more limited character, namely, a licence or permission to fly and land revocable for grave cause, such as the intentional penetration of prohibited zones of airspace about fortresses and other places of a military or naval character.

At the Paris Conference of 1910 no agreement was reached in regard to the nature and scope of the rights of foreign aircraft in the airspace above the territories and territorial waters of a state. In

1913 the Sub-Committee of the Committee of Imperial Defence suggested the insertion of the following articles in the convention :

1. Each contracting state shall permit for so long as the present convention is in force the aircraft of the other states to fly within the limits of and above its territory, subject to the restrictions laid down in the following rules :

2. Each state shall have the right to impose restrictions on the navigation of foreign aircraft, and, more particularly, to forbid such navigation so far as it deems necessary in order to guarantee its own security or that of the lives and property of its inhabitants.

These restrictions shall be applied without any inequality to the aircraft of every other contracting state.

It is, however, agreed that on personal grounds, independent of its nationality, a state can exempt an aircraft of any other contracting state from any one of the restrictions imposed in virtue of the first paragraph.

The Special Committee No. 1 of the Civil Aerial Transport Committee have approved the first paragraph of these proposals. But in respect to the second paragraph they make the following observations :

The rule proposed by the Committee of Imperial Defence Sub-Committee limits a contracting state's right of restricting navigation by the aircraft of other contracting states, and prohibits it from differentiating as between different foreign contracting states. This proposal is open to the objection that one contracting state might use its powers of restriction more severely than others, but nevertheless could not on this account be differentiated against by the others. To meet this objection the Special Committee would propose to insert the following after the second sub-paragraph :

" It is, however, agreed that any contracting state may refuse to accord to any other contracting state any facilities which the latter does not itself accord under its regulations.

" It is also agreed that on personal grounds," etc., etc.

It is clear that, if the proposals of the Sub-Committee of the Committee of Imperial Defence, as amended by Special Committee No. 1 of the Civil Aerial Transport Committee, are embodied in the future convention, foreign aircraft will not be accorded a right of innocent passage of the nature and scope of the existing right of innocent passage for foreign vessels in territorial waters. The

right proposed is of a more limited character, namely, a conventionary permission or licence to fly. From every point of view it is desirable that the limited character of the permit to fly and land should be emphasised in the convention. If it be agreed by the contracting states that the permit may, for serious cause, be revoked in individual cases, foreign aerial navigators will be held to a higher standard of care in the observance of the municipal regulations of a state in respect to such matters as customs, health, police, and prohibited zones.

The question as to the entry of foreign military aircraft into the territorial airspace of a state is one of special difficulty which demands separate treatment in the convention. The Sub-Committee of the Committee of Imperial Defence have proposed certain alterations in the terms of the draft convention of 1910 in regard to this matter, and these alterations have been approved by Special Committee No. 1 of the Civil Aerial Transport Committee. As thus amended the draft convention provides as follows:

Art. 44: The departure or landing of the military aircraft of a contracting state in the territory of another state, as well as the passage of military aircraft over such territory, will only be allowed with the authorisation of the latter state.

Art. 45: Nevertheless, a sojourn required by necessity cannot be refused to the military aircraft of a contracting state. . . .

Art. 46: When the stay of the military aircraft within the limits of, and above, the territory of a foreign state is to be regarded as legitimate, in conformity with Art. 44, such aircraft will enjoy the same privileges as are accorded by international usage and courtesy to foreign ships of war.

The above privileges will also be accorded to the members of the crew wearing uniform, so long as they do not cease to form a distinct unit or are carrying out their duties.

The question as to the carriage of goods by aircraft is one which the draft convention has left undecided. In Art. 34 it is provided that "the carriage of goods by air can only take place in virtue of special conventions between the states concerned or of the provisions of their own legislation." Special Committee No. 1 approve this article, provided that the word "goods" be taken to mean goods in a commercial sense.

The result of the adoption of the principle of Art. 34 will be the conclusion of many special conventions in regard to the international

carriage of goods. The provision of such conventions will naturally vary in order to meet the needs of the contracting states; but the various treaties will undoubtedly embody certain common features. In course of time, therefore, it may be possible to incorporate these common features in one codifying convention, and thus to produce uniformity in the fundamental rules of the law of international commercial carriage by aircraft.

British Legislation in regard to Aerial Navigation.—Pre-war legislation by Parliament and the authorities of British possessions is clearly inadequate to meet the situation created by the ever-increasing importance of civil and commercial flight within the Empire and between the various parts of the Empire and foreign states. The conclusion of a convention legalising international flight will require quite new legislation. The Air Navigation Act 1919 is, of course, a temporary measure, designed to facilitate civilian flight.

The recommendations of the Civil Aerial Transport Committee concerning the provisions to be embodied in future legislation are of great interest and importance. The main proposals are contained in the draft of the Bill for the Regulation of Aerial Navigation which was prepared by the Home Office in 1911. In general this Bill is in conformity with the terms of the Aerial Navigation Acts, 1911 and 1913, the Orders in Council issued under them, and the legislative enactments of certain of the British possessions. But the Bill goes much further than the existing legislation and constitutes a comprehensive code for the regulation and control of aerial navigation within the Empire. Subject, however, to the terms of any future international convention binding the Empire as a whole (as, for example, provisions in regard to registration of aircraft and collision regulations), the Bill does not in general limit the legislative powers of British possessions outside the British Islands. Based as it is upon the model of the Merchant Shipping Act, 1894, the Bill applies to aircraft many of the rules now in force in regard to merchant ships.

The general scope of the Bill may be indicated by noting that it embodies provisions in regard to the following matters, namely, powers to regulate aerial navigation, the nationality and registration of aircraft, certificates of the airworthiness of aircraft, certification of officers, collision regulations, identification of aircraft, air-

craft papers, signals of distress, customs and Post Office regulations, trespass and damages for injury caused by aircraft, salvage of wrecked aircraft, search of aircraft by police, seizure and detention of aircraft, forgery of certificates and other documents, punishment of offences, foreign public aircraft, power to fire on aircraft flying over prohibited areas, jurisdiction of courts, British aircraft, the application of the Foreign Enlistment Act of 1870, and the exemption of Government aircraft from the rules applied to aircraft in general. The Civil Aerial Transport Committee give their approval to the general lines on which the Bill is drawn, but state that aeronautical developments since 1911, the year in which the Bill was drafted, render necessary a modification of some of its provisions.

It is manifestly impossible for the present writer to deal, within the limits of this article, with more than one or two of the many legal problems raised by the text of this comprehensive measure.

One of the most important of all these problems is constitutional in character, namely, the powers of control and regulation to be exercised by the various Government Departments, such as the Home Office, the Board of Trade, Customs, Post Office, and Air Ministry. This problem in constitutional organisation involves also vital questions in national and imperial policy. Special Committee No. 1 state that in their opinion—

> the creation of a new Air Ministry will afford a convenient opportunity for conferring on the Ministry the powers of the Home Office and Board of Trade to regulate aerial navigation. The advantages of assigning to a single Department of State the regulation of all matters relating to civil aerial transport are manifest, and the relevant clauses of the Bill [drafted in 1911] will require amendment accordingly.

The Main Committee in their final Report give their approval to this suggestion. The Special Committee [No. 1], they say,

> have expressed a definite opinion that all the powers and duties of regulating aerial transport should be assigned to the Air Ministry. This proposal offers certain advantages in grouping in one Department officials and experts responsible for the issue and administration of regulations, which in the present case must to a great extent be governed by naval and military considerations. As an illustration, it is only necessary to refer to the close connection between prescribed landing places for foreign aircraft and prohibited areas. As against the proposal the

analogy of railways and shipping seems logically to point to the desirability of assigning aerial transport to the Government Department primarily concerned with trade and commerce, *i.e.* to the Board of Trade. If the former view, which we consider the preferable one, be adopted, some legislation in extension of the Air Force (Constitution) Act, 1917, would seem to be necessary to enable the Air Ministry to create the organisation required to deal with civil as distinct from military flying.

It has long been recognised that the development of aviation upon any considerable scale will involve some alteration of the principle of the English common law that the right of the landowner embraces not only the land itself, but also the superjacent airspace, filled by air, up to the heavens (*cujus est solum ejus est summitas usque ad cœlum*). The existence of this right raises problems as to trespass and nuisance caused by the flight of aircraft over land in private ownership. There is a possible solution of these problems[1] by dividing the airspace into a lower and an upper zone. The lower zone is the one under the effective possession of the landowner; and the entry of an aircraft into this zone might well be regarded as a trespass for which the owner of the aircraft should be held liable to pay at least nominal damages. Inasmuch as the upper zone is not in the effective possession of the landowner, the principles applicable to it might well be different from those to be applied to the lower zone. The right of the landowner in the upper zone would seem to be adequately protected by an action for nuisance as distinct from an action for trespass.

The problem of trespass and damages for injury caused by aircraft is dealt with in s. 12 of the draft Bill for the Regulation of Aerial Navigation, in which it is provided, *inter alia*, that "the flight of an aircraft over any land in the British Islands shall not in itself be deemed to be trespass."

Special Committee No. 1 remark in their Report that this section is—

very important to landowners. It proposes to deprive the landowner of his frequently asserted right to the airspace over his land *usque ad cœlum*. To retain this doctrine in its entirety would be fatal to civil aeronautics. On the other hand, to allow unrestricted flying over private property at all altitudes would interfere with the reasonable rights of landowners. The interference would take the form either of trespass or of nuisance.

[1] *Cf.* Pollock, *Law of Torts*, 8th ed., pp. 348, 349.

The Committee therefore recommend that the Bill should provide as follows:

(*a*) No action for trespass should lie except for material damage to person or property, whether caused by flight, ascent, or landing, or the fall of objects from aircraft.

(*b*) That this right of action for trespass should include one for injury caused by the assembly of persons on the landing or ascent of aircraft elsewhere than at authorised aerodromes or landing places.

(*c*) That the obligation on the aviator in an action for trespass should be absolute, negligence not being a necessary element in his liability and "unavoidable accident" no defence.

(*d*) That an action for nuisance should lie for damages only, and then only if breach of flying regulations is proved as well as actual nuisance.

(*e*) That special flying regulations should be made in connection with the ascent and landing from or at authorised aerodromes and landing places, and for the area around the aerodrome or landing place over which aircraft must necessarily be at low altitudes. . . .

(*f*) That the power of seizure and detention proposed in [s.] 12 should be limited to what is necessary to establish the identity of the aviator and his aircraft.

Reasonable apprehensions may be entertained of nuisance being caused by the frequent flight of aircraft at low altitudes along regular routes, but the Committee are not at present in a position to make any recommendations as to limitations of altitude being prescribed by regulation.

The Main Civil Aerial Transport Committee have adopted these suggestions of Special Committee No. 1 concerning the main lines of legislation in regard to trespass and nuisance. They point out that while the proposed legislation deprives the landowner of his right to the airspace *usque ad cœlum*, it nevertheless effects an insurance of himself and his property against damage by aircraft, and that this will lead the owners of aircraft to insure themselves against third party risks. The Main Committee agree with the Special Committee that it is impracticable to define some altitude, flying below which would involve a civil liability on the owner of aircraft. One member of the Special Committee dissents from this view. He holds that "the public will demand, and rightly, a limit above which (except under stress of weather) aviators must fly above private property, and that any persistent flying under this height should be preventable by injunction."

In conclusion it may be remarked that many of the legal problems

considered by the Civil Aerial Transport Committee in their Reports have been studied by lawyers in several countries for the last ten or fifteen years. Certain of the results of these studies, especially in the domain of the regulation of international aerial navigation, have been embodied in the Reports as the basis of some of the observations and recommendations of the Committee. At the same time a perusal of the Reports shows conclusively that the members of the Main Committee and of the Sub-Committee have studied legal questions in the light of recent war experience, and that, by means of their own original research, they have been enabled to indicate a fresh solution to certain questions of special difficulty. The Reports are a real contribution to the study of aerial law; and many of the observations and recommendations embodied in them will find their way into the provisions of international conventions and legislative enactments.

VIENNA AND VERSAILLES, 1815 AND 1919.

[*Contributed by* F. J. C. Hearnshaw, Esq., M.A., LL.D., *Professor of History, King's College, London.*]

I.

On July 30, 1814, the Regent, on behalf of George III., closed Parliament with a speech in the course of which he said: "The unexampled exertions of this country, combined with those of His Majesty's Allies, have succeeded in effecting the deliverance of Europe from the most galling and oppressive tyranny under which it has ever laboured."

If the speaker could have cast his eye forward a hundred years he would have seen "this country," once more in combination with "His Majesty's Allies," preparing to put forth exertions still more tremendous in order to save not Europe only but the world from a tyranny even more galling and oppressive than that which Napoleon had exercised over the subject Continent. It was, in fact, by an interesting coincidence, precisely on July 30, 1914, that Sir Edward Grey sent his historic reply to the German Chancellor, and refused to be lured into a dishonourable and transient neutrality at the cost of the abandonment of the French Colonies to the land-lust of the Teutonic aggressor.

Napoleon and William II.—There is no doubt that the war which began in 1914 was planned and precipitated by William of Hohenzollern and his General Staff with the same deliberation and determination as the war which ended in 1814[1] had been prepared and prosecuted by Napoleon and his marshals. Bonaparte, indeed, was the Hohenzollern model both in diplomacy and in the conduct of military operations. Fortune, however, has decreed that the rôles of Napoleon I. and William II. should be reversed. The

[1] The Napoleonic War, 1804–1814.

Corsican began his life in obscurity; he was thrown to the surface of public affairs by revolution; he was the creature of a conflict[1] which he had done nothing to provoke. The Kaiser, on the other hand, inherited the most commanding monarchy in the world; the true source of his power, could he but have realised it, was the unparalleled prosperity of forty years of peace; he wantonly embarked upon a war of conquest which has ended in a revolution that has cast him down from the pinnacle of greatness to the depths of ignominy and impotence.

Great Britain as a Deciding Factor.—The world-struggle that ended in 1814 was a long one; it lasted ten full years. That which began in 1914 was a comparatively short one, although more protracted than was at first expected. In each of the two Great Britain played a central and decisive part. If the Napoleonic war dragged on its weary length for a whole decade, the cause was very largely the fact that for the first five years Britain limited her efforts to the sea, and refused to put forth her strength on land. Not until she allowed Wellington to supplement the achievements of Nelson did the goal of ultimate victory come within view. If the German war of 1914 has been terminated in less than half the time occupied by its prototype, one of the determining causes has been the fact that from the outset Britain threw herself into the struggle by land as well as by sea. There is no doubt that the conflict might have been still further abbreviated if Britain had but been better prepared for a continental campaign, or even if, after the war broke out, she had exerted her full strength at an earlier date.

The Influence of a Powerful Ally.—But although Britain thus played a leading part during the whole course of both the wars under review, in neither of them did she immediately decide the issue. In each case the issue was directly determined by the late advent of a powerful ally whose fresh and enormous resources turned the scale. In 1812 it was Russia; in 1917 it was the United States. In spite, however, of the decisive influence exercised by Russia in the one instance and by America in the other, out of both conflicts Britain emerged with immensely enhanced prestige and power. It was universally recognised in 1814 that but for the dogged resolution with which she had continued to resist the Napoleonic domination year after year, even when all her allies were beaten, and all her

[1] The Revolutionary War, 1792–1802.

coalitions shattered, the Corsican tyranny could never have been brought to an end. At the present time it is no less generally perceived that but for British valour, British determination, and British wealth, the long-planned Hohenzollern bid for world-dominion must have been successful. Hence British influence is hardly less powerful at Versailles in 1919 than it was at Vienna in 1814–15.

II.

Two Great Idealists.—The plenipotentiaries who met at Vienna a hundred years ago, like those who at the beginning of this year gathered round the council-table at Versailles, represented peoples wearied by the intolerable burden of unprecedented war, and eager for the establishment of perpetual peace. In each case the passionate desires of the pacific peoples were voiced by a great idealist. Alexander I. of Russia in 1814–15 occupied the place at Vienna and later at Paris which in 1919 was occupied at Paris and later at Versailles by President Wilson. The two men, of course, differed greatly, and their ideals diverged widely; but their ultimate object was the same, viz. the bringing into existence of some organ of international government capable of preventing war, suppressing revolution, and administering justice. Alexander I., with an inherited strain of madness in his nature, with a conscience permanently deranged by the guilt of participation in parricide, with his emotions raised to irrational heights of evangelical exaltation by the ministrations of the Baroness Krüdener, formulated the scheme of the "Holy Alliance" of autocrats. This association of pious potentates was to consist of all European rulers who would pledge themselves "to take for their sole guide the precepts of the Christian religion" and "to strengthen themselves more and more every day in the principles and exercise of the duties which the Divine Saviour has taught to mankind." The Sultan of Turkey was, of course, not invited to join this sacred League of Autocrats. Of those who were invited all but two accepted: the two exceptions were George III. of England, who was a hopeless lunatic, and the Pope, who was not. The folly of the "Holy Alliance" did not, it is needless to say, consist in the loftiness of its ideal. It would, on the contrary, be the sublimest wisdom if only politicians could

moralise their craft, could persuade themselves that honesty is indeed the best policy, and could regard their functions as religious trusts. The folly of the " Holy Alliance " consisted in the vagueness of its principles, the absence of any agreement as to what the application of religion to politics meant, and the lack of all executive machinery for giving effect to its noble sentiments.

President Wilson, although an idealist, is also an historian who is well aware of the causes of the failures of the " Holy Alliance," and of all similar attempts to establish international control of continental affairs. He is, too, a practical administrator of sound judgment and wide experience. Hence the " League of Free Nations "—or, more exactly, the Alliance of Democratic States—which he has inaugurated at Versailles is free from the weaknesses of its Parisian prototype. Its membership is restricted to peoples whose governments are of a uniform, or at least congruous type ; its principles are clearly defined ; it is provided with simple but powerful machinery of operation. There is, moreover, another feature that distinguishes the League of Nations from the " Holy Alliance." The inauguration of the latter was deferred until the treaty settlement of Vienna was quite completed ; it was an appendix to the peace. The creation of the present League has been the first business of the Versailles Conference ; it is the preliminary to the peace. The difference in time and order is an important one. The " Holy Alliance " included the combatants on both sides of the preceding Napoleonic War : the League of Nations is founded on the confederation of the peoples that has beaten the Central Empires in the great world-struggle now drawing to its close. Germany, Austria, Turkey, and Bulgaria are not original members of it, nor will they be admitted until they have given conclusive evidence that they accept its terms. This is as it should be. To have admitted them now, unrepentant and unreformed, would have been to doom the League to futility. So much, at any rate, the fiasco of the " Holy Alliance " has taught. Hence its ignominious and ludicrous career was not wholly fruitless. As Gentz, who himself played a prominent part in 1814–15, remarked : " If ever the Powers should meet again to establish a political system by which wars of conquest would be rendered impossible and the rights of all guaranteed, the Congress of Vienna as a preparatory assembly will not have been in vain."

III.

The Enemy of Reconstruction.—The problem which confronts the negotiators at Versailles in 1919 is indeed fundamentally the same as that which faced their predecessors at Vienna in 1814–15. It is the restoration of Europe and its dependencies after a tremendous world-war. In each case the precedent conflict had been marked by the removal of ancient boundaries, the overthrow of venerable dynasties, the profound movings of many peoples. In each case, too, the clear lines of the subsequent settlement were much deflected by a number of secret treaties and conventions made under the stress of dire necessity during the process of the struggle. It is needful in 1919, as it was in 1814–15, to keep the faith of pledged engagements even though those who entered into them see reason to deplore their precipitate unwisdom. Apart, however, from these perverting pledges, the general principles of the settlement of 1919 are as plain as were those of 1814–15. The difference between the two sets of principles is, nevertheless, striking and conspicuous. The Western world has during the century that separates Versailles from Vienna moved far and fast along the lines of political evolution. In 1814–15 the guiding idea of the settlement was legitimacy, and the settlement itself aimed at being as far as possible a restoration of the conditions which had existed prior to the outbreak of 1789. The "Revolution" was the enemy which was to be overcome, the demon which was to be exorcised; and the "Revolution" was identified with national democracy. In 1919 the principle of national democracy is everywhere accepted; hence not restoration but reconstruction is the prime object of the plenipotentiaries. But once again "Revolution" presents itself as a disturbing element. It is, however, no longer the "Revolution" of a century ago. Rousseau is now a canonical evangelist, and the Jacobins are but over-zealous apostles. The new "Revolution" is cosmopolitan Socialism, and the modern supplanter of Rousseau is Karl Marx. *Absit omen!* For if indeed the future lies with Bolshevism then will Versailles be as futile as Vienna; vain will be the establishment of international peace; empty will be the formulation of a League of Nations; mankind will be fated to face and to endure the horrors of a century of a Class War which will inaugurate a new Dark Age. Let us hope for a happier issue.

A GUIDE TO SOUTH AMERICAN LAW.

[*Contributed by* C. M. KNOWLES, ESQ., LL.B.]

WITH the broadening of ideas which has been effected by the war is coming an appreciation of the advantages of having readily accessible information concerning the legal systems of the countries with which it is hoped that Great Britain may do an extensive post-war business. Foreign rules of law governing, for example, patents, trade marks, bills of exchange, banking, and the conditions under which foreign corporations are allowed to do business, are bound to be matters of which persons trading abroad require particulars. The attention of traders proposing to do business with, say, Brazil should be called to the requirements of that country as to the registration of firms and the books which a merchant is required by the commercial code to keep. Firms proposing to send representatives to Argentina need to be informed as to the fees to be paid by commercial travellers on entering the various provinces, and, if they are unable to obtain payment from a creditor, how to secure speedy settlement by means of the so-called execution action. Others may require information on the prolific nitrate legislation of Chile. And it should not be possible for the chairman of an important Argentine railway which had suffered serious loss through strike depredations to be obliged to make such an admission as this: "I told you a year ago that we intended to put in a claim to the Argentine Government for that damage. We have not been able to do so. Naturally, we do not know in detail the law of foreign countries, and we thought we should have a legal claim either on the Government or on the province. Well, it appears, as far as we can gather, that we were wrong. In this country, and I believe in most countries, if you have damage done to your property by civil disturbances you have a claim on the local authorities. We thought it was the same there."

Scope of the Volume.—The sources of information on these and many other points are examined in the *Guide to the Law and Legal Literature of Argentina, Brazil and Chile* recently published by the United States Government. The book is the fourth of the series of guides to foreign law published by the Library of Congress. The object of the editors is "to

furnish the lawyer and the student of comparative law with information as to the institutions and literature of the public and private law of the countries under discussion ; secondly, to acquaint the legislator and the man of affairs with the recent development of legislation, particularly that designed to meet the social and economic problems of the day ; and, thirdly, to give the jurist and the historian some guidance to the contributions made in these countries to the history, the theory, and the philosophy of law."

In Spanish America law has always occupied a fundamental position in the curriculum of a liberal education, and the study of law has by no means been confined to those who propose to follow a legal career. Accordingly, as well as editions of the numerous codes and collections of reports of decisions in the federal and local Courts, there is a plentiful supply of literature dealing with legal theory and general jurisprudence, all of which is noticed in the volume under consideration. It is a commentary rather than a catalogue, and perusal of its 500 pages yields a fund of information on the history and present position of the legal and political systems of the three countries.

Sources of South American Law.—The present volume appropriately follows the *Guide to the Law and Legal Literature of Spain*, in which country " the foundations were developed, if not laid, for the institutions of private law of the Spanish American republics," for " when the discovery of America had taken place the Kings of Spain put into force in their new dominions the various codes which had governed in Castile." On this body of law, special laws, decrees, and orders for the regulation of the political, administrative, ecclesiastical, and municipal affairs of the colonies in America were superimposed. The forms of legal procedure were also inherited from Spain. Codification, however, followed in due course, and the process of reducing the law of the three countries to the form of codes has now attained something like completeness.

The Civil Codes.—In Argentina, a civil code of 4,051 articles came into force on January 1, 1871, the Argentine Constitution having provided so far back as 1853 for the enactment of civil, commercial, criminal, penal, and mining codes. The civil code of Brazil came into force on January 1, 1917, more than fifty years after the first draft had been submitted by the notable codifier, de Freitas. The civil code of Chile came into force on January 1, 1857, ten years after the publication of the first draft. Thus, on a foundation of Spanish and French private law there have been built up civil codes to which the legal systems of most civilised countries have contributed, and which stand as worthy monuments to the learning and industry of three remarkable codifiers, Dalmacio Velez Sarsfield in Argentina, Augusto Teixeira de Freitas in Brazil, and Andrés Bello in Chile. The Chilian civil code, for example, laid under contribution not only the old Spanish law, but also the Roman law, the Code

Napoléon, the Code of Louisiana, and the Austrian *Allgemeines bürgerliches Gesetzbuch.*

Commercial Codes.—In each of the three countries commercial law is the subject of a special code and is administered by special Courts. Brazil was the first of these States to promulgate a commercial code. It dates from 1850 and was principally based on the French, Spanish, Portuguese, and Dutch codes of earlier dates. Many related topics are the subject of special decrees, notable among them being the decree of 1908 by which the Brazilian law relating to bills of exchange and promissory notes was completely revised. This decree had the distinction of providing the basis for the draft of an international code on bills of exchange adopted at the Hague Conferences of 1910 and 1912. "It closely resembles the modern German law, originally the work of the *Zollverein*, which, with the 'Nurnberg Novels,' and as consolidated in 1869, has commended itself to the scientific and commercial world and to the modern legislator as the best of modern codes."

The first commercial code of Argentina was promulgated as a national code in 1862. It was based principally on the Brazilian code of 1850. The second and existing code came into operation in 1890.

The commercial code is more liberally construed than the civil code. "The latter provides that usage or custom cannot create rights unless the law so provides and that anything not explicitly or impliedly mentioned in the code cannot have the force of civil law. The commercial code, on the other hand, provides that in all matters in which individual agreement may vary the general law, the judge may ascertain whether custom may give commercial transactions the effect intended by the parties, and that commercial customs may serve as rules to determine the meaning of technical words and commercial phrases."

Agitation for the revision of the code of 1890 is constant, and already it has been amended by various subsequent laws. The manner in which corporations are controlled is an interesting instance. By a law of 1912 "foreign corporations were dispensed, under condition of reciprocity, from the obligation imposed by the commercial code of obtaining a preliminary authorisation from the executive in order to do business in Argentina. They need merely show that they are regularly constituted in their home countries and register their bye-laws." Laws of 1907 and 1909 require corporations to submit their balance-sheets to an inspection bureau in the Department of Justice; and the "Law of Debentures" of 1912 has for its object the protection of bondholders of corporations by providing for the election of trustees by the bondholders, who shall exercise a certain amount of surveillance over the business of the corporation.

The existing commercial code of Chile came into force in 1867. It is based principally on French and Spanish sources.

Procedure.—Methods of procedure in South America are still those handed down by Spain. Procedure is almost entirely in writing. Evidence comes before the judge in that form, but in Argentina, " after complaint, answer, and evidence have been brought together in one file for submission to the judge, the parties have the right to make an oral argument before the decision " ; while in Brazil " the record constitutes the sole basis for the decision of the Court of first instance and of the appellate tribunal, subject to oral arguments, which either Court may request for its enlightenment."

Each of the three countries attaches to the higher Courts an officer from the Department of Justice called a fiscal. In addition to the duties discharged by the English Law Officers, the fiscals sit as judges, their special function being to look after State interests and to see that the laws are duly executed.

Criminal Law.—The Italian positivist school, which regards crime as a pathological phenomenon, has considerable influence among South American lawyers. In Brazil, for example, the criminal code, based on that of Italy, only permits capital punishment under military law and in time of war, and punishment restricting liberty is limited to thirty years.

Quite an extensive literature has grown up on the subject of the jury system as part of criminal procedure. " The final conclusion seems to be that the jury system is an instrument inadequate for the solution of Argentine criminal cases, except perhaps in certain offences committed by the press." In Brazil the jury system has been preserved, although the tendency is to restrict it to the narrowest limits. " The formal rules for the operation of the jury system resemble those of the United States, although in practice it is said not to work well."

While innovations have been introduced in some directions, the general conclusion seems to be that the South American States have been content, when building up their legal and political systems, to take advantage of the experience of European countries.

NOTES ON INTERNATIONAL LAW.

The Enforcement of International Law through Municipal Law.—Owing to the difficulties under which the Journal has been produced during the last four years, there has been a regrettable delay in noticing Dr. Wright's treatise dealing with *The Enforcement of International Law through Municipal Law in the United States*, published by the University of Illinois. The subject of the book is the manner in which the United States through municipal action avails itself of the rights and ensures the fulfilment of the obligations which are conferred or imposed upon it by international law. International law is a law between states, and if one state has a grievance against another state, it seeks redress by diplomatic methods, and not in municipal courts. But the international lawyer considers it among his duties to be informed as to the manner in which the law of nations is in fact enforced and applied within the different states, and Dr. Wright has made a valuable contribution to the study of comparative law which is necessary for this purpose. His book embraces a large number of subjects, and stirs the embers of many controversies. Among the conclusions which he reaches during his research, the following are of special interest:—

Such matters as the recognition of new states and newly acquired territory, intervention, termination of treaties and declaration of war, the President and Congress decide according to their views of national policy, and the judicial and administrative organs of Government will look to them for guidance, and will not look beyond them to international law. Treaties are declared law by the constitution. In statutes, express recognition of international law is more frequent than in England. In the American Courts, the doctrine that the law of nations is the law of the United States, and must be applied in appropriate cases, has been recognised from the earliest times. International law will be held to furnish the

rule upon which a case should be decided, unless it is in direct conflict with the constitution, a statute, or an executive order authorised by statute. Treaties and statutes will be regarded as of equal authority, a later treaty overruling an earlier statute, and *vice versa*. In cases where the interpretation of a statute or an executive order is doubtful, an attempt will be made to construe it in harmony with international law.

Professor Oppenheim's Lectures on the League of Nations.—Among the many books and articles on the League of Nations which have been written during the past few years, Professor Oppenheim's three lectures [1] deserve special study. He believes that the difficulties which stand in the way of the League can be overcome, and looks with confidence towards its establishment; but he points to the danger of ignoring historical development in international relationships,

> lest the realisation of proposals be attempted which are so daring and so entirely out of keeping with the historical development of international law and the growth of the society of nations, that there would be great danger of the whole scheme collapsing and the whole movement coming to naught.

Professor Oppenheim does not, however, merely point out difficulties and utter warnings; he is a constructive critic, and offers a series of proposals which, while less drastic than those advocated by many supporters of the movement, are calculated to lay a secure foundation upon which the future could build a larger edifice.

In his first lecture, the lecturer traces the history of the conception of a League of Nations and its interdependence with international law. It was not until the later Middle Ages that there was sufficient intercourse between independent sovereign states to render necessary a law between them; and no sooner had they formed themselves into a society (afterwards called the Family of Nations) than a number of schemes for establishing world peace, either by a federation of states or by resort to arbitration, made their appearance. These plans, however, found no practical application; and although there was a Family of Nations and a law between them, this law did not claim to prevent war.

[1] *The League of Nations and its Problems.* Three Lectures by L. Oppenheim, M.A., LL.D. (Longmans, Green & Co., 1919.)

Indeed it could not have done so, because, until the nineteenth century, European states were being constituted through the activities of strong dynasties; by marriage, purchase, war, and conquest, they were increasing their territory and acquiring colonies. But in order that permanent peace may be secured under the ægis of a League of Nations, and through the administration of law, it is essential to eliminate these processes, and, as a preliminary step, to adjust the territory of states according to some equitable and generally accepted standard, and to ensure that each state is governed under a just and commonly adopted constitutional principle.

And what does the new League of Nations involve? According to Professor Oppenheim, it involves a solemn treaty, a rule not to resort to arms without first submitting the dispute to an International Court or Council of Conciliation, and an organisation to carry out the purposes of the League. In the minds of some of its advocates, it involves a great deal more: an international government and an international army and navy. But with them Professor Oppenheim takes issue: "A federal state comprising all the single states of the whole civilised world is a Utopia, and an international army and navy would be a danger to the peace of the world." He instances the British Empire to show that such a federation could only be kept together by the good-will of the component parts, and that "no central Government could keep them together against their will." To the proposal for an international force, he applies the saying: *quis custodiet ipsos custodes?*

In his second and third lectures, the lecturer shows in outline how "the hitherto unorganised Family of Nations can organise itself on simple lines so as to secure, on the one hand, the absolute independence of every state, and on the other hand, the peaceful co-existence of all the states," by (1) agreeing to submit to an International Court every dispute that can be settled on the basis of a rule of law, (2) agreeing to submit every political dispute to a Court of Conciliation before resorting to force, (3) agreeing to unite their economic, military, and naval forces against any member who breaks these rules. Organisation for this purpose must start from, and keep intact, the independence and equality of all civilised states, and might profitably build on the foundations laid by the

two Hague Conferences. The League should consist of all the recognised fully independent states; its chief organ should meet periodically at the Hague; and a permanent Council should be created to conduct current business, and act as a general secretariat. Every member of the League should be entitled to take part in the meetings, but their resolutions should require ratification by each state concerned, and should not bind a dissentient minority.

Professor Oppenheim proceeds to discuss the constitution of the International Court of Justice. He traces the steps which have already been taken in this direction, touches upon the obstacles to be surmounted, and puts forward a plan which he believes would secure for the Court the confidence of the states involved in litigation. He would at the same time guarantee the maintenance and sequence of tradition in the administration of international justice. In cases where a vital political principle was at issue, as well as a question of law, he would empower the Court to determine whether or not it should give judgment upon the dispute, and he would also make the Court competent to adjudge a claim by a party to a treaty to be released from its obligations on account of vital change of circumstances.

Turning to mediation through International Councils of Conciliation, Professor Oppenheim sets out Art. 8 of the Hague Convention and the relevant articles of the Arbitration Treaty between Great Britain and the United States of September 15, 1914. He then outlines his own proposals, under which there would be a number of councils available in case of disputes, and, in addition, a small permanent council, among the duties of which would be that of watching the political life of members of the League, and of communicating with all the members, in case the peace of the world seemed to be endangered by the attitude of one. In conclusion, the lecturer touches upon disarmament, considers how far his conception of a League of Nations would involve a surrender of sovereignty by its members, and casts a short glance at the future.

International Rivers.—The first[1] of a series of publications promised by the Grotius Society is the work of a Belgian scholar who shows remarkable facility in the use of the English language. It relates the diplomatic history of a number of international rivers.

[1] *International Rivers.* A monograph by G. Kaeckenbeeck, B.C.L. Published for the Grotius Society. (Sweet & Maxwell, Ltd.)

After stating the main legal theories and principles which have been invoked, and drawing from them the conclusion "not that there is a right of free navigation, but that there are excellent reasons, theoretical and practical, for recognising and applying the principle of free navigation for all on international rivers," the author turns to the practice of states, and in the second section of his book discusses exhaustively the diplomatic documents relating to the Rhine and the Scheldt, the Danube, the Congo, and the Niger. The third section opens with a brief statement of some of the author's conclusions. He finds the obstacles to the development of free navigation not in any reluctance to admit the principle, but in the "mazes of regulations" where "legions of egoistical and particularistic interests are lurking ready to dispute every inch of ground with the advancing general interest." The remainder of this section is occupied by a full and annotated statement of the rules adopted by the Institute of International Law at Heidelberg in 1887 for the navigation of international rivers, and at Madrid in 1911 regarding their utilisation for industrial purposes. Three appendices deal briefly with other European and African, and a number of American rivers. In a preface the writer summarises the various arrangements made by convention for the administration of the rivers discussed in the second section of the book. He points out that the Congress of Vienna confined itself to propounding general principles, and did not stipulate the particular means by which the administrative co-operation of the riparian states was to be assured. On the Rhine, equal treatment was provided for the ships of the upper and the lower riparians under the regulations of 1831, but each state retained full sovereignty over its own part of the river. On the Scheldt in 1839 dual supervision was arranged. The feature of the Danube treaties was the establishment of a European commission. The most usual arrangement, however, and that recommended by the Institute of International Law and the writer of this monograph, is a riparian commission. "Such an administration, having primarily in view the interests of the river, of navigation and of commerce, mostly does away with the danger of friction resulting from the immediate contact of officials and departments. . . . It does not, like the establishment of a condominium on the river, encroach upon the vital right of self-protection of every state or necessitate a sharing of sovereignty." The

interests of the non-riparian Powers are, in his opinion, adequately safeguarded by a provision in the main treaty that all regulations inconsistent with the principle of free navigation for all are *ipso facto* void. This monograph bears throughout the marks of industry and ability; but the arrangement and presentation of the material are open to criticism. The elaborate numerical and alphabetical subdivisions of the table of contents are sometimes at variance with the text, and the headings of sections are not always well chosen. The first three appendices should have been worked into the text, and the author's general conclusions ought all to have been collected into one place, preferably at the end of the book. There are other similar defects, and an attractive publication, with useful maps, written by a scholar of distinction, has in consequence lost some part of its value. It may be thought that the author's next work, and the next publication of the Grotius Society, should be more carefully revised and edited; but in any case they are assured of a warm welcome.

Documents on International Law.—Under the direction of Dr. James Brown Scott the division of international law of the Carnegie Endowment for International Peace has issued a series of sumptuously produced volumes. The *Armed Neutralities of* 1780 *and* 1800 [1] is the title of a collection of official documents constituting the armed neutrality of 1780 and of 1800 together with the orders putting them into effect and diplomatic correspondence. To these have been added the views of distinguished American and foreign publicists in order to give a clearer understanding of their origin, nature, and effect. The other two volumes are French translations of works which have previously appeared in English. One [2] contains Dr. Brown Scott's edition of the documents relating to the Hague Conferences of 1899 and 1907, and the other [3] is *Une Cour de Justice Internationale*, comprising memoranda prepared by him on the subject before the declaration of war.

International Communications.—In an article in the January number of the *International Review* Mr. A. E. Zimmern deals with the problem of freedom of transit on international highways. As regards the rivers he suggests the formation of commissions for each of the rivers concerned composed of representatives of the riparian states with the addition of one outside member who would represent

[1] Oxford University Press. 21*s.* [2] *Ibid.* 8*s.* 6*d.* [3] *Ibid.* 10*s.* 6*d.*

the interests of the non-riparian states. These local commissions would be supervised by a Transit Commission established by the League of Nations. Canals would be regulated by treaties similar to those controlling the Suez and Panama Canals under the guarantee of the League of Nations. Similarly railways would be covered by treaties, in the enforcement of which powers would be given to the Transit Commission. Although the conception of an international railway has not yet made its appearance, there are precedents in agreements between states to secure freedom of transit for their goods. "Coastal trade" is another matter which might be brought within the purview of such a commission.

Prisoners of War.—One of the chapters of the laws of war which the experience of this war has shown to be in urgent need of revision is the status of prisoners of war. The provisions of the Hague Convention, though they have on the whole been substantially respected, require considerable supplementing on many points. First, the making of prisoners is at present only regulated by the rules prohibiting (1) the killing or wounding of enemies who have surrendered at discretion, having thrown down their arms or possessing no longer the means of defending themselves, and (2) the declaration that no quarter will be given. It is not perhaps for civilians to suggest any express relaxation of these counsels of humaneness and restraint. Even up to Wellington's time the right to refuse quarter was stated to be still in force, in cases where a hopeless resistance was persisted in, *e.g.* in the capture of fortified places whose defences were breached after summons to surrender; and as late as 1898 the official instructions for the United States armies (which were a reissue of those issued in 1863 for the American Civil War) permitted a commander to direct his troops to give no quarter in great straits when his own situation makes it impossible to cumber himself with prisoners,[1] though it must now be regarded as obsolete. Other reasons for refusing it are as punishment for treachery in pretending to surrender and then renewing the fighting, or even possibly for safeguarding an advancing force against the possibility of an attack from the rear.

Again, the treatment of prisoners of war in captivity has been shown by this war to fall lamentably short of the requirements of the Hague Convention, that they shall be humanely treated, that

[1] Stockton, *International Law*, 1914, 324.

all their personal belongings except arms, horses, and military papers remain their property, that they must be maintained by the capturing Government and, unless specially agreed between the belligerents, must have the same food, clothes, and quarters as the captor's troops. More explicit definitions are also required of the labour on which they (other than officers) may be employed than that "their tasks shall not be excessive and must have nothing to do with the operations of war" when it is remembered how in this war they have been placed in exposed positions in the zone of active operations and employed on works for military purposes. Similarly too it should be stated whether it is even permissible to treat them as hostages or as objects of retaliation for breaches of international law committed by the enemy. The extent of punishment permissible for such acts as attempted escape and insubordination should be explicitly stated; and generally power should be given to the International Red Cross to inspect prisoners' camps and hospitals, and report deficiencies in their food and sanitation, etc., and recommend removal of invalids to neutral countries, with a corresponding obligation on the belligerents to give effect to such requirements. The examination of the juridical position of prisoners might well be carried forward another stage; instead of being "in the power of the hostile Government," it might be placed under the protection of the International community.

Another branch of the subject—for which we have to go back a hundred years for a precedent—is the treatment, as regards person and property, of the interned enemy alien—which is of course a police measure by a belligerent Government for its domestic safety, and is an alternative to expulsion. The novelty of this action is shown by the fact that so modern a book as Hershey, *International Public Law* (1912), only mentions, as regards this, that such persons may not be forcibly detained or held as prisoners (362). The whole theme may well be commended to the consideration of such a body as the Grotius Society.

Grotius and the Freedom of the Seas.—In a paper lately read before the Grotius Society, Mr. W. S. M. Knight observed: "It is somewhat strange that so little should be known, and that largely inaccurate, of the visit of Grotius to England in the year 1613. In this visit Grotius was concerned with the essentially British questions, the freedom of overseas trade and of the seas, as important

and interesting to-day as at any time during our history. Levesque de Burigny, in his biography, now over 150 years old, gives a confused and most inadequate account, that Grotius came to England in the year 1615 to negotiate a settlement of the Anglo-Dutch differences over the Greenland fisheries. The only subsequent biographers, Butler, about a hundred years since, and Dr. Vreeland, in a book published in 1917, adopt, without attempt at investigation, this account of Burigny, and this though there are some more or less fugitive sketches of the life of Grotius in which definite hints appear as to the truth. But what is worse is that Basderant, in Pillet's *Fondateurs du droit international,* is also misled by Burigny and the conventional account. It is therefore necessary that this point should be settled once for all.

" Grotius came to England in the spring of 1613. His business was to negotiate a settlement, between the merchants of the British and Dutch East India Companies, of the Anglo-Dutch differences as to the conduct of the East Indian trade. In substance it was an inter-state negotiation, Grotius and his three colleagues having letters of recommendation from Prince Maurice and the States General to King James. His colleagues were Dutch merchants, Grotius being included in the mission as legal member, and also, most probably, as secret agent of the Arminians with a view to securing English sympathy for the Arminian cause in Holland.

" Nine years before, hardly in his twenty-second year, Grotius had written his *Mare Liberum,* a book which has ever since been almost universally acclaimed as the classic exponent, if not the actual creator, of the doctrine of the freedom of the seas. It was written at a time when the Dutch East India Company was beginning definitely to establish itself as the one serious rival of the Spaniards and the Portuguese in the trade of the waters of the Far East. Grotius appears to have had at that time some connection, as lawyer, with the company—nothing important, probably one of the assistants or " improvers " in the office of its regular advisers. In 1608 the book was published, when the Dutch were almost on the eve of supremacy in many parts of those waters, and when it might be valuable to present to the world a formal argument against the claims of the Portuguese to a monopoly of the eastern trade. An examination of the book reveals that the *Mare Liberum* is but its catch or running title. The sub-title is ' The Right of the Dutch

to share in the East Indian Trade.' And that is the thesis of the book. The question of the freedom of the seas is but subordinate, though necessarily incidental, to that of the freedom of trade. By the Law of Nature, 'permanent and immutable,' all men and peoples have an absolute right to trade with one another. No man or people has any right to monopolise or even to restrict trade. Such is the doctrine of Grotius, expounded and developed with a wealth of rhetoric and dialectic. It was, in short, the characteristic effort of a scholar of those days, anxious to attract the attention and secure the patronage of some influential group—in this case the Dutch East India Company. It was a blow aimed at the restrictive and monopolising policy of the Portuguese.

"Only a year or two, however, were to pass. The Dutch, in many parts of the East, had dispossessed the Portuguese and established themselves as lords of large part of the eastern trade. But the Dutch East India Company had now no occasion for the doctrines of the *Mare Liberum*. The English, who also were searching these seas for trade, must be excluded, if possible, from the eastern trade. At any rate every effort must be made to prevent any increase of their share in it. And so the clients of Grotius were mercilessly harrying and obstructing the English, and straining every energy to establish for themselves a monopoly of the trade of the East, and, if possible, to exclude the English.

"Obviously the English would persist at any cost. Such a course must result in war. These differences might, however, be settled amicably by diplomatic methods. The British merchants therefore presented to the Secretary of State a petition begging him to endeavour to secure from the Dutch Company some observance of the principles of 'freedom of trade.'

"It was this petition for 'freedom of trade,' directed against the Dutch, that brought Grotius and his colleagues to London in 1613. His duty was to press the Dutch counter-charges against the English, to oppose the doctrine of freedom of trade and, incidentally, that of the freedom of the seas, to justify the monopolist policy of the Dutch, and to negotiate, if the English could not otherwise be satisfactorily dealt with, an Anglo-Dutch combination which should arbitrarily restrict and monopolise the trade and waters of the Far East.

"Nor does Grotius appear to have been perturbed at the incon-

sistency of his case, now a practical one, with his youthful dialectic of the *Mare Liberum*. The English, even as though quoting from that book, urge its very arguments. But no, Grotius has now apparently no faith in them. The laws of nature and of nations are often variable and indefinite, and depend upon circumstances ; and as for suggestions of monopoly, is not that founded on the right to contract—that right which gives freedom to all? Such are his arguments in London.

" And in this manner did the negotiations proceed during a period of nearly two months. The English urged the doctrine of freedom of trade and of the seas, and Grotius, on behalf of the Dutch, opposed it by reference to the actual facts of life and society. And Grotius was probably more in the right as negotiator than as author. The world has ever repudiated as rank foolishness two out of the three arguments of Grotius in his *Mare Liberum*, that sovereignty over primitive peoples can be acquired only under certain conditions he mentions, and that trade is and must be free under all circumstances. It might be wise if that doctrine were also abandoned, that the open sea cannot, because of the very nature of things, under any circumstances or as to any part, be the subject of particular ownership or sovereignty. The question rather should be whether, in a particular case, such ownership or sovereignty may be just and expedient. And at the same time Grotius was also straining every effort to engage England in war with Spain. This visit, therefore, is an event of especial interest in the life of the author of *De Jure Belli*, because of the light which it sheds upon his work and personality."

NOTES ON CASES.

AUSTRALIA.

[*Contributed by* JAMES EDWARD HOGG, ESQ.]

Novel Easement of Light.—It is said in Theobald's *Law of Land* (p. 91) that "a right to the access of light can only exist in connection with a building," and by "building" a building in existence is generally taken to be meant. The High Court of Australia [1] has held that an easement may be validly created by a grant of a right to the access of light and air to the doors and windows of buildings *to be erected* on the dominant land over the servient land. Referring to the argument that the claim for the right to light hereunder was "too large and too uncertain" to constitute a valid easement, it is said in one of the judgments delivered: "We can find no reason either in principle or authority for this view of the law. An easement is appurtenant to and for the benefit of the dominant tenement as a whole, and not to or for the benefit of any particular building." This appears to be the first "reported decision"—to adapt the language of the Chief Justice, Sir Samuel Griffith—"in which a grant of a general easement of light has been supported."

State Governments and the Royal Prerogative.—*Joseph* v. *Colonial Treasurer* [2] deals with a scheme of pooling wheat as a war measure and the injury inflicted on the plaintiff as a private citizen by the scheme. A question of great interest is, however, raised with respect to the authority of a State executive to control the exercise of the Royal prerogative, and the interest of the case will doubtless survive the echoes of the war. The plaintiff, conceiving that he had been injured by the Government of the State

[1] *Commonwealth* v. *Registrar of Titles*, (1918) 24 C.L.R. 348.
[2] (1918) 17 S.R. (N.S.W.) 624, revd. 25 C.L.R. 32.

of New South Wales in their efforts to control the production of wheat, brought an action against the Crown, and was awarded £1,321 by a jury. The Supreme Court of New South Wales (three judges) unanimously set this verdict aside, holding that the plaintiff was not entitled to be compensated for his admitted loss. The High Court of Australia (five judges) unanimously restored the verdict of the jury, reversing the decision of the Supreme Court. The reports in both Courts must be read in order to appreciate properly the two different points of view taken of the case. The result of the litigation is to bring out clearly the extent to which federation has deprived the separate States of their privileges as sovereign communities. By the federal Constitution the defence of Australia is exclusively assigned to the Commonwealth Government. The State Government in the present case assumed to interfere with the plaintiff's business as a dealer in wheat, alleging that these acts of interference were done with a view to conserving the wheat resources of New South Wales for the nation at large, and in exercise of the Royal prerogative to take extreme measures in time of war. The Supreme Court of New South Wales held that the acts complained of were justified as an exercise of the Royal war prerogative. The High Court of Australia held that the State had not the power or function of exercising the Royal war prerogative. This apparently is a case of interpreting the federal Constitution, from which there is no appeal except by leave of the High Court of Australia itself.

Possession and Registration of Title.—The necessity, or at all events the desirability, of including in statutory schemes of registration of title to land some provision for enabling the register to be rectified in favour of persons who, in the case of unregistered land, would get a title by mere length of undisturbed possession, was judicially referred to in a New South Wales case.[1] Harvey J. said: "It is to my mind one of the great flaws in the system of the Real Property Act that there is no provision analogous to the Statute of Limitations, by which long-continued possession crystallises a title." The case against the New South Wales Act is stronger than it was put by the learned judge, for by s. 45 it is expressly enacted that no title can be "acquired by any length of possession" when land is once brought under the

[1] *Turner* v. *Myerson*, (1917) 18 S.R. (N.S.W.) 133.

Real Property Act. An instance of injustice being done to a person rightfully in possession who was thus unable to dispute the title of the registered owner is *Hamilton* v. *Ivedale*,[1] the principle adopted in the Victorian Transfer of Land Act and other similar statutes might with advantage be introduced into the New South Wales Real Property Act. The whole subject of registration of title was dealt with in a former volume of this Journal.[2]

Crossed Cheques and "Negligence" of Bank.—Two cases, the result of a carefully contrived scheme of fraud in disposing of stolen cheques, are reported from New South Wales.[3] The defrauded banks were sued by the true owners of the cheques. The principal defence in each case was that the bank had received payment for a customer of a crossed cheque "without negligence," under s. 88 of the Australian Bills of Exchange Act, 1909 (s. 82 of the English Act of 1882). The plan adopted in each case was the same; the thief opened an account with the bank, and the day after being accepted as a customer paid in the stolen cheque for collection, the proceeds being drawn out immediately afterwards. In one case the bank was held to have acted "without negligence," and so escaped liability; in the other the true owner succeeded, "negligence" being held to have been proved against the bank. The negligence alleged in both cases was the same—opening an account with a stranger and making no inquiries about him. The negligence proved was that in the case in which the bank was held liable the account had been opened with a sum of money which included crossed cheques. Evidence was given that the practice of many banks is to decline to allow a stranger to open an account with a crossed cheque as his first payment. In the other case, where the bank escaped liability, the first payment in had consisted of notes, and no evidence was given that it was unusual to open an account with a stranger who paid in cash only. Negligence being mainly a question of fact, it is not surprising that in neither case was the Court unanimous.[4]

Motor-car Exempt from Distress for Rent.—The Supreme Court of New South Wales has decided that the keeper of a garage who

[1] (1903) 3 S.R. (N.S.W.) 535.

[2] Journ. Comp. Leg. xv. 83 (1915); and see *ibid.* xviii. 272 (1918).

[3] *Kendall* v. *London Bank of Australia*, and *Commissioners of Taxation* v. *English, Scottish and Australian Bank*, (1918) 18 S.R. (N.S.W.) 394, 417.

[4] Cf. *London Joint Stock Bank* v. *Macmillan and Arthur* [1918] A.C. 777.

takes in motor-cars for their owners, as a livery-stable keeper takes in horses and carriages, is a person exercising a public trade, and a motor-car delivered to him to be kept on the premises for the owner's use is exempt from distress. Motor-cars at a garage were held to fall within the second of the five exemptions enumerated in *Simpson* v. *Hartopp* [1]—"Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." Whether horses and carriages at livery can be seized under distress for rent by the stable-keeper's landlord may be open to doubt. The present case was decided on the view that such horses and carriages are exempt from distress.

Restraint in Testamentary Power.—*In re Harris* [2] discloses the sordid details of a family quarrel, but it is of interest as a reminder that the Oversea Dominions are following in the steps of the civil law and restricting testators in the exercise of complete dominion over their property. This case was an application to the Court for maintenance under the New South Wales statute [3] which, like similar legislation in Victoria and New Zealand, [4] enacts that if a testator disposes of his property in such a way that the widow or children are left without adequate provision, the Court may order proper provision to be made out of the estate of the deceased. The New South Wales and New Zealand statutes apply to the case of a woman leaving her husband inadequately provided for; the Victoria statute protects only the widow and children.

INDIA.

[*Contributed by* SIR ERNEST TREVELYAN.]

Power of the Governor-General in Council.—In *Parmeshwar Ahir* v. *The Emperor* [5] the Patna High Court disposed of a somewhat bold contention that the Governor-General of India in Legislative Council has no power to create a new Court of Justice in India, and that such Court can only be established by an Act of Parliament

[1] (1743) Willes 512, 1 Sm. L.C.
[2] (1918) 18 S.R. (N.S.W.) 303.
[3] Testator's Family Maintenance and Guardianship of Infants Act, 1916 (No. 41).
[4] See "Testator's Family Maintenance in New Zealand," by James Christie, *Journ. Comp. Leg.* (December 1918), vol. xviii. p. 216 *et seq.*
[5] (1918) 3 Patna L.J. 537.

or by letters patent. Nearly all the Courts of Justice in India, and they are very numerous, have been established by the authority of the Indian legistature, so to have held otherwise would have been to declare that the five High Courts of Bengal, Madras, Bombay, Allahabad, and Patna are the only Courts which have been lawfully established in India, and that the Chief Courts of the Punjab and Burma, the Courts of Judicial Commissioners, and the many subordinate Courts in India have no jurisdiction.

The particular enactment which was in question in this case was the Defence of India (Criminal Law Amendment) Act (IV of 1915), which gave power to the Local Governments to appoint Commissioners for the trial of any person accused of anything which is an offence in virtue of any rule made under s. 2 of the Act, or accused of any offence punishable with death, transportation, or imprisonment for a term which may extend to seven years, or of criminal conspiracy to commit, or of abetting, or of attempting to commit or abet any such offence.

The accused was tried by Commissioners, who had been appointed under the above Act, and was convicted of the offences of dacoity (gang robbery), rioting, and injuring and defiling a Mahomedan place of worship with the intention of thereby insulting the Mahomedan religion. Dacoity, which is the most serious of these offences, is punishable with transportation for life.

On an application for a writ of *habeas corpus* it was contended that the Governor-General in Legislative Council had no power to create the Court which convicted the accused.

The judges of the High Court were unanimous in holding that s. 22 of the Indian Councils Act,[1] which was in operation when Act IV. of 1915 was passed, gave full power to create new Courts of Justice. S. 22 gives to the Governor-General in Council power at meetings for the purpose of making laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within British India.

The High Court in this case followed the construction which had been placed on the statute ever since its enactment.

Position of Hindu Widow as Heiress of her Husband.—A Hindu widow as heiress of her husband takes the entire estate, but she

[1] 24 & 25 Vict. c. 67

has no power to alienate it, and on her death it passes to the next heir of her husband. It is in some respects different from a life estate. The Hindu law does not measure an estate by its duration but by the powers incident to it. In *Chaudri Risal Singh* v. *Balwant Singh* [1] a Hindu female, in whom an estate vested upon the death of her husband and infant son, instituted a suit for a declaration that an adoption made by her to her deceased husband was invalid. Both Courts in India held that she was estopped by her conduct from denying the validity of the adoption, and the suit was dismissed on that ground. Upon appeal to the Privy Council,[2] the decree was confirmed upon the ground of estoppel, and the Board further held upon the facts that the adoption was valid. Upon the death of the widow the reversionary heir sued for a declaration that the adoption was invalid. As it appeared that on the previous appeal there was a fair trial of the right upon the merits, the Judicial Committee held that although he was not a party to the previous litigation, the reversioner was bound by the previous decision, as the widow completely represented the estate.

Personal Order against Attorney.—The Judicial Committee has frequently commented upon the waste of money in the printing of unnecessary documents in appeals, but has taken no active steps to prevent such waste. In *Laxmibai* v. *Radhabai* [3] a Division Bench of the Bombay High Court ordered the attorneys for the appellant to pay personally costs occasioned by unnecessary printing at their instance. Action of this kind is likely to be more efficacious than mere comments, but in the absence of stricter rules on the subject the position of an attorney is not an easy one. It is dangerous to omit from the paper-book documents which have a bearing upon views which may possibly be taken by the appellate tribunal.

BRITISH GUIANA.

[*Contributed by* W. R. Bisschop, Esq., LL.D.]

A new series of Law Reports for British Guiana appeared in 1914, and there are now four volumes complete, including the year 1917, from which some notes at somewhat more than the usual length

[1] (1918) L.R. 45, I.A. 168. [2] (1912) L.R. 39, I.A. 142. [3] (1917) 42 Bom. 327.

may be justified in connection with the decisions based upon Roman-Dutch law, as it is no longer the common law of the Colony.

1914.

Trustee Investments.—In *In re David Young, deceased, ex parte Mathew French*, p. 8, the question had to be decided what are proper investments for moneys to be administered by guardians on behalf of their minor pupils. The late Sir F. Crossley Rayner, C.J., though deploring the fact that the Colony did not possess legislation regarding the investment of trust funds as in England, held that " the law bearing on this subject is clearly laid down in van der Linden's *Institutes of the Law of Holland*, i. 5, 3 (Henry's edition, p. 102): ' He ' (*i.e.* the guardian) ' must collect and call in with the greatest diligence the outstanding debts, and the cash in hand must be laid out in Government securities yielding interest.' " On this passage the late Chief Justice decided that—without the special sanction of the Court—under Roman-Dutch law at the present day a guardian may only invest a minor's money in " Government securities yielding interest."

It is a pity that the late Chief Justice satisfied himself with this single authority, and that from a translation which, unfortunately, is incorrect. It must be admitted that the original passage of van der Linden, as printed in Dutch, viz. " De ingevorderde penningen moeten door hem aan rentegevende effecten op het gemeene Land belegd worden," is somewhat obscure. The literal translation, " the realised cash must be invested by him in securities yielding interest on the common land " leaves a query as to what is meant by the author, but it certainly does not authorise Henry to render " securities yielding interest on the common land " as meaning " Government securities," which are a creation of the nineteenth centuy and unknown to the Republic of the Seven Provinces of the Netherlands.[1]

A reference to the authorities quoted by van der Linden himself would have brought to light that the printed text in Dutch is incorrect, and most likely contains a misprint. If, instead of the

[1] The same curious error will be found in Henry Juta's translation (Cape Town, 1884, p. 36) and in Morice's translation (Cape Town, 1914, p. 43). Pereira in his *Laws of Ceylon*, 2nd edition (1913), p. 198, evidently copies one of the translations without further investigating the text.

word " op " (which means " on " in English) be read the word " of " (in English " or "), the literal translation would run " securities yielding interest *or* the common land." This slight alteration not only renders the sentence quite intelligible, but brings it into harmony with all the other authorities. The guardian is entitled, without sanction of the Court, to invest in " securities yielding interest " or " to buy land." This is borne out by Grotius, Introduction, 1, 9, 10 ; J. Voet, *Ad. Pand.* xxvi. 7, 10, 1 ; *Regtsgeleerde Observatien*, iii., Obs. 13 ; van der Keessel, *Theses Selectæ*, Thes. 153–5.[1] Perhaps van der Keessel's passage is the most elaborate on the point and the clearest indication of the discretionary powers of a guardian. From these authorities it appears that first and foremost the safest investment is considered " land " and " landed property." Next come " securities yielding interest," that is to say, a guardian may not leave his pupil's money lying idle. If he do not invest it in land, he must see to it that it yields interest. This is a strict rule, emphasised by the fact that the investment must be made in from two to six months after the money becomes available. The sanction is that the negligent guardian himself must otherwise pay interest, as high as 6 per cent. or more.

The kind of securities is often only vaguely, if at all, indicated in the various town ordinances. There was no necessity for a binding rule in this respect, as the guardian remained fully liable for any negligence in his choice of investment and was at liberty to consult the Orphan Chamber of those days. For his own protection he would consult such a Chamber or the Court, but by not doing so the guardian did not render *ipso jure* his investment null and void. To decide that an otherwise sufficiently safe investment was wrong, because it was not a " Government security," goes beyond the rules of Roman-Dutch law.[2]

Married Woman's Rights.—*Ramdeen* v. *Soodhaya*, p. 17, deals with the capacity of a woman, married with community of property, with the leave of the Court, to sue or defend in person without the

[1] See also Maasdorp, *Institutes of Cape Law*, vol. i. p. 263 and the authorities quoted by him.

[2] As to the practice in South Africa, Morice on p. 44 of his translation of v. d. Linden's Institutes writes : " In the present day, although a guardian would use his own discretion as to investing the money of a ward on mortgage, he may still make an application to the Court for authorisation to act for the ward in matters ofi mportance."

assistance of her husband, " if the latter is far off or not to be found, and the matter is urgent," a situation dealt with at nearly the same time in South Africa by the Witwatersrand Local Division, Johannesburg, in *Ex parte Delouche.*[1]

1915.

Relocatio. — In *de Freytas* v. *Consolidated Rubber and Balata Estates,* Dalton J. leads us through the controversies in modern times regarding the Roman-Dutch theory of tacit renewal of leases of houses, *tacit relocation* as it is called locally. The history of the controversy dates back to the early days of the Dutch Republic when the lessees of lands maintained that they were entitled to the so-called *na-huyr.* This led in the Dutch Republic to a system of tacit renewals of leases which was a long time a source of trouble and litigation. In South Africa the matter has long occupied the Courts of Law, difference being made between the tenancy of houses and the lease of lands. In British Guiana, as far as the letting of house-properties is concerned, the general custom in force is to enter into a verbal agreement for a monthly tenancy at a fixed rent per month. The tacit continuance of that occupation is based upon an implied contract of tenancy to be gathered from the action of the parties, and that tacit continuance is known as *relocatio.* Whether there is an implied contract of tenancy has to be gathered from the circumstances of each particular case. Tacit relocation will be presumed where both parties adopt and continue the position in which the termination of the lease found them ; in other words, where the lessor is content that the lessee should remain and the lessee is content to remain. This relocation depends just as much upon the consent of the landlord, as inferred from his conduct, as it does upon the conduct of the tenant ; and hence there can be no danger that a tenant can ever be ejected from premises he occupies. A tenant who wrongly holds over is liable to the lessor in damages.

Onus probandi.—*Rodriques* v. *Craig* deals with the *onus probandi* in a criminal prosecution where the accused has given a reasonable account of his being in possession of stolen property. On November 1, 1913, a bicycle was stolen from one Lord. On January 1, 1914, the accused had left a bicycle against the wall of

[1] (1914) W.L.D. 73.

the post office. Coming out of that building, he was riding it away when he was arrested. He stated to the constable who effected the arrest that he had lent a man 7 dollars some two weeks ago, from whom he had taken the bicycle as security for the loan. Lord identified the bicycle as his property.

On the hearing of the charge of larceny the defendant gave evidence on oath, and repeated at length the story of his possession, then giving the name and appearance of the pledgor—Nathaniel Williams, "a tall stout man"—and adding that he had known Williams for two years and nine months, and that Williams lived in Belfield. He also stated that he was himself the owner of a bicycle, and that he had removed the badge from his own machine, and put it on Lord's.

The magistrate convicted the defendant, who then appealed.

This appeal was heard on February 11, 1914, before the late Sir Crossley Rayner C.J., who ordered that the case should be referred back to the magistrate "to take further evidence, particularly with regard to the man Nathaniel Williams, from whom appellant stated he obtained the bicycle." This evidence was not taken, on account of the non-appearance of the defendant on the day fixed by the stipendiary magistrate for the hearing thereof; and the case then came before Sir Charles Major C.J., who had to consider whether the order of the late Sir Crossley Rayner was correct or whether the defendant had the right to have his case dismissed in view of his having given a reasonable cause of his possession, which had not been upset by evidence on the part of the prosecutor.[1] Sir Charles Major ordered the magistrate to have Nathaniel Williams brought before him and examined on behalf of the accused and, if the said Nathaniel Williams could not be found, to certify this to the Court. The magistrate followed the direction, and reported to the Court that Nathaniel Williams could not be found.

When the case was again heard it was contended on the part of the defendant that the prosecutor had proved the defendant's possession of certain property which appeared to have been stolen, and that this laid upon the latter the onus to explain his title; that the defendant had done so, and had given an explanation which might be true, and that thereupon the magistrate—in the absence of any evidence from the prosecution to test the truth or untruth of

[1] *R.* v. *Crowhurst*, 1 C. and K. 370, and *R.* v. *Smith*, 2 C. and K. 207.

the defendant's explanation—should have acquitted the defendant. The Chief Justice agreed that this contention was right, and that the magistrate ought to have acquitted the defendant, as it was not the defendant's duty to prove the truth of his explanation. At the same time the Chief Justice decided that if he quashed the conviction, that would be to ignore " the evidence given under the order of reference from Sir C. Rayner as reinforced by himself, an order made to supply the very evidence for which the magistrate should have called." As, however, the result of the order of reference seemed to create an impression that Nathaniel Williams did not exist " so strong as to leave no reasonable doubt whatever that the explanation was untrue," the appeal was dismissed with costs.

Auction.—In *Wight* v. *Demerara Turf Club* (*in liq.*) the mutual position of auctioneer and bidder at a public auction was tested under the rules and doctrines of Roman-Dutch law. The Demerara Turf Club possessed Bel Air Park, a racecourse, which—after the Club had gone into voluntary liquidation—it was decided to sell by public auction. The liquidator, a certain Nelson Cannon, who was also a licensed auctioneer, obtained leave from the Judge in Bankruptcy to act as auctioneer at the sale, and that sale was then advertised in the following ferms : " Nelson Cannon will sell by public auction by order of Mr. Nelson Cannon as liquidator of the Demerara Turf Club, Ltd., on Friday December 4, 1914, at 1 p.m. on the premises (in the Grand Stand) fifty-five acres of land known as Bel Air Park with all buildings, erections, fixtures thereon." Conditions of sale were prepared and contained a description of the property and five conditions of sale which were in what appeared to be an accustomed form. To acquire good and sufficient security from the buyer, a payment of 10 per cent. of the purchase money and all church and poor rates would be due on the knock of the hammer, and the balance on transport, providing for time on giving possession, costs of transport and decision of disputes as to biddings or otherwise arising at the auction.

There was no reserve price fixed.

On December 4, 1914, the auctioneer attended at Bel Air Park for the purpose of the auction. He read out the conditions of sale and the auction was started with a bid of 15,000 dollars. That was increased by 5 dollars. Thus 16,000 dollars was bid, and this bid

was increased by the plaintiff with 5 dollars. No further advance was made. After a pause the auctioneer said: "I am sorry that I cannot sell it at that price" (or words to that effect), and the auction was discontinued. The company dispersed.

Wight now maintained that he had bought the Bel Air Park Racecourse, because he was the highest bidder at a public auction, and that—if no reserve price were mentioned—according to Roman-Dutch law the offer made by the auctioneer was to the highest bidder, and that on the bidder's acceptance of such offer by his bid, the auctioneer was bound to knock the property down to him as the highest bidder and purchaser.

The Demerara Turf Club denied this, and maintained that not the auctioneer, but the bidder was the offeror, and that the auctioneer could accept or refuse any offer made, or abandon the sale altogether.

The point in dispute seemed a small one, but gave rise to a controversy. A direct precedent does not exist in Roman-Dutch law, and the only authority dealing with the point in question was Matthæus. In his book *De Auctionibus* the Utrecht professor maintains that an auctioneer, once having offered to sell by public auction and having started the auction by receiving bids, was unable to withdraw the property, and that, unless a reserve price were mentioned, the auctioneer was bound to knock the property down to the highest bidder.

Auctions in Holland were very much the subject of local custom, and though very well known as to the formalities observed thereby, their legal effect is scantily described in works of law. In describing and illustrating public auctions, the Roman-Dutch authors deal mostly with forced public sales in case of executions, not with private or voluntary auctions. In their attempt to find a legal basis for auctions, they tried to assimilate local customs with the Roman law, but in doing so they did not follow the Justinian Codes, but the writings of the glossators and commentators of the Middle Ages, who did not always understand or properly explain the classic texts. Sir Charles Major C.J. followed Matthæus in this. He considered that an auction sale was a conditional sale, and that the condition annexed to it came under the description of an *in diem addictio.* An *in diem addictio* was one of the *pacta* which in Roman law could be attached to a

sale, and whereby the purchase became subject to the condition that, unless the vendor obtained a better offer within a certain time from some other person, the contract made with the purchaser would take effect, or, whereby the contract would take effect at once, but would be rescinded if another person were to make a better offer within a certain time.

The Justinian Codes do not deal with public auctions. Though known, they were not common and have been dealt with only in some four places of the Digest and the Code. These deal with the sales of booty and ecclesiastical property. Further the Justinian legislation is silent on the subject; and we must take it that the Roman jurists considered auctions as subject to the ordinary rules of contract. The Romans never recognised the possibility of contracts being entered into with *incertæ personæ*. The bidder therefore could never be the acceptor, as—until he had opened his mouth—he was an uncertain person. By making his bid, he became known, and with him, as offeror, the auctioneer would make a contract by accepting his offer.

The commentators did not understand this. Looking for some doctrine under which they could place public auctions, they hit upon the *in diem addictio*, the conditional sale which showed similarity with a public auction only in this respect, that more than one bid could be taken into consideration.

The Dutch jurists followed suit, and upon this fallacy a whole theory was built up by Matthæus, which again was followed in British Guiana, the learned men in succession accepting a wrong interpretation without taking the trouble of going back to the *fons originis* and explaining the Roman law from the original text, whilst at the same time disregarding the custom of the country or understanding such custom properly.

Under the impression that the *in diem addictio* of the Roman law applied to auction sales, the British Guiana Chief Justice argued that an auction sale was a transaction whereby property was put up for sale "upon a suspensive condition—which is always annexed and subsisting, and which is fulfilled upon assignment (*addictio*) to the highest bidder—that the sale shall not take effect if any person offers a better price and is accepted." He held that in an auction an auctioneer must be considered as the acceptor for the vendor, and that the time of his acceptance and the signifying thereof was

" when the *addictio*, the assignment is made, that is to say, if and when the property is knocked down to the highest bidder."

The Chief Justice then reviewed the passages of Matthæus which bear upon this subject. On the facts of the case, he came to the conclusion that the auctioneer had not used the words " to the highest bidder " in the conditions of sale, but that the law seemed to be clear, that an auction sale when the property is not stated to be subject to a reserve price must be understood as a sale to the highest bidder, whether these words be used or not. As, however, the acceptance lay with the auctioneer, and the knock of the hammer had not taken place, no mutual agreement as to the price of the property had been arrived at, and Wight was not entitled to be considered as the purchaser of the property.

1916.

In the following year the case came up on appeal before the full Court. Berkeley and Hill JJ. reversed the judgment of Sir Charles Major C.J. They held that, according to Roman-Dutch law, at a public auction, if no reserve price be announced, the auctioneer is the offeror and his offer of the property for sale is accepted by each bidder in succession, the auctioneer being bound to knock down the property to the highest bidder. In their opinion the bidding should be considered as a competition between the various bidders. In this competition all parties were bound by their word, viz. the auctioneer by his offer to sell to him who would be victorious in the bidding, and the bidders by their bids, each in succession, should such bid prove to be the highest. Should the bid of the highest bidder prove to be insufficient in the opinion of the auctioneer, he could not withdraw the sale, but postpone it, in order to obtain a higher bid. If no higher bid were forthcoming, he was, however, bound to knock the property down to the highest bidder. Such postponement was the *addictio in diem.*

This argument is very ingenious, but—not Roman-Dutch law. Those authorities who compared the auction with a sale subject to an *addictio in diem* compared the very bidding with such a conditional contract. Every bidder by his bid completed, so it is said, a contract of sale on condition that if a higher bid were made before the auction had come to an end the former bidder would be released of his contract.

These authorities, however, overlooked the fact that the *addictio in diem* in Roman law was a condition in favour of the seller, and that the buyer under such condition was bound until the seller had accepted a higher offer, a right which he had reserved to himself at the time of entering into the contract with the buyer.

In appeal the British Guiana Court evidently felt some difficulty in applying the *addictio in diem.* Instead of somehow trying to make it fit, they would have done better by eliminating it altogether from their consideration, as a part of Roman law entirely foreign to auction sales.

The liquidator obtained leave to appeal to the Privy Council. This necessitated a stay of execution of the judgment against the company. In the meantime the mortgagees of the Bel Air Park Racecourse, the British Guiana Mutual Fire Insurance Company, had obtained leave from the Chief Justice on December 18, 1915, to institute proceedings against the Demerara Turf Club for the recovery of the sums due under the mortgage, and to prosecute the same to judgment; but the Chief Justice had at the same time ordered that such judgment should not be enforceable for a period of six months. The mortgagees obtained judgment on January 19, 1916, and in accordance with the Chief Justice's ruling levied execution on July 20, 1916, and advertised the sale for August 8, 1916. In the *British Guiana Mutual Fire Insurance Co. Ltd.* v. *The Demerara Turf Club Ltd.* (*in liquidation*), *ex parte P. C. Wight*, P. C. Wight—who in the meantime had obtained his judgment (in appeal) against the liquidator—applied for a stay of the sale on the ground, *inter alia*, that his judgment, which was obtained April 17, 1916, against the company, if affirmed by the Privy Council, would be rendered nugatory by the intended execution.

As remarked by Hill J., the difficulty in this matter was largely due to the conflicting rights of creditors under the British Guiana Companies Consolidation Ordinance, No. 17 of 1913, which is framed on English law, and the rights of mortgagees under Roman-Dutch law. In English law the mortgaged property vests in the creditor subject to the mortgagor's equity of redemption. In case of bankruptcy the property remains in the creditor, the equity of redemption vesting in the trustee in bankruptcy.

According to Roman-Dutch law the mortgagor remains the owner of the mortgaged property, whilst in case of bankruptcy

the property vests in the trustee in bankruptcy. The mortgagee is entitled to sell the mortgaged property (in case of bankruptcy, if immovable, with the sanction of the Court previously obtained) and to recoup himself out of the proceeds.

Mr. Justice Hill considered that under the rule provided by the above-mentioned Ordinance of 1913 a liquidator has the power to realise the movable and immovable property of the company by public auction, and to distribute the proceeds among the proved creditors, giving priority to the secured creditors. Under the common law a mortgagee could not be deprived of his right to assert his *jus in re* and executing the same, but he could be estopped from doing so if by his conduct he had refrained from asserting it in time, *e.g.* if he had been silent when the mortgaged property was sold by the Fisc.

Under the circumstances the learned judge considered that the mortgagees, who had not proved as creditors in the liquidation, had attended the liquidator's auction on December 4, 1914, had bid without having previously exercised their rights as mortgagees, and, as the auction of December 4, 1914, had been considered binding by the Appeal Court, and this judgment stood unless and until upset by the Privy Council, could be said by their conduct to have acquiesced in the sale by the liquidator. Accordingly he held that it was just and convenient that there should be a stay of execution of the subsequent judgment in execution obtained by the mortgagees until the appeal to the Privy Council should be determined.

In a subsequent application, *In re Wight* v. *The Demerara Turf Club, Ltd.* (*in. liq.*), *ex parte the British Guiana Mutual Fire Insurance Co., Ltd.*, the mortgagees tried to prevent the liquidator from prosecuting his appeal to the Privy Council, on the grounds, *inter alia*, that he had not previously obtained the mortgagee's consent.

Sir Charles Major C.J. refused leave to the mortgagees to commence proceedings for the purpose set out, and held that in a liquidation of a company the liquidator had full power to take any legal proceedings he thought fit, especially if the Court or committee of inspection sanctioned it. A liquidator need not consult the creditors or any individual creditor in the matter, especially not such as had not proved in the liquidation.

It was nowhere explained in these proceedings how, legally,

Wight had a right to intervene in the action between the Fire Insurance Co. and the Demerara Turf Club, and the judges who formed the Court of Appeal expressed their serious doubts whether he was properly before the Court at all. However, as that question had not been raised during the proceedings they did not think that they should take notice of it.

Wight's position became even more doubtful in the light of after events. On April 25, 1918, His Majesty in Council [1] (reversing the decision of the Appeal Court in *Wight and the Demerara Turf Club, Ltd.*) decided that, in accordance with the principles of Roman-Dutch law, at the auction held on December 4, 1914, the estate belonging to the Demerara Turf Club had *not* been sold and that Wight had never acquired any right in the property at all. As far as the Demerara Turf Club is concerned Wight was therefore held to have been at all times a stranger who had no interest whatever in the property, except perhaps as a member of the Club and a supporter of the Turf.

1917.

Lease in Longum Tempus.—In *Naseban and others* v. *Alves and others* Sir Charles Major C.J. had to consider the character of a lease *in longum tempus*. Synadabi, the mother of the infant plaintiffs, had granted to the defendants a lease for a term of fifteen years of a plantation which was the property of the plaintiffs under the will of their father, who was Synadabi's first husband. Synadabi had married a second time, and had executed the lease as natural guardian of her infant children. The lease was not executed *coram lege loci*, and the question was raised whether under the circumstances the lease was binding upon the infants.

Sir Charles Major followed the decision of *Caravan and Rivers* v. *Transvaal Gold Mines, Ltd.*,[2] as he considered that the judgments of Sir J. Rose-Innes and Curlewis J. given in that case (and being "judgments of great research wherein the whole history of the controversy was reviewed and criticised") settled the law "not only it seems for South Africa," but also for British Guiana.

On the strength of the Transvaal decision the Chief Justice held that a lease of ten years or longer was a lease *in longum tempus*;

[1] [1918] A.C. 605. [2] (1904) T.S. 136.

that it corresponded with an alienation of immovable property and therefore had to be executed *coram lege loci*, that is to say, "in British Guiana, as in the case of other alienations, before a judge and a registrar." In parenthesis it may be remarked that registration in South Africa has taken the place of execution before the judge, "a change, I hope," as the Chief Justice remarked, "soon to be made in this Colony" (British Guiana). The execution before a judge, however, is only required for the legality of a long lease with regard to third parties, even if executed *inter partes*. A lease executed not before a judge and not registered —though invalid as to third parties—is considered binding as between the parties themselves. This led to the question whether the plaintiffs could be said to have been parties to the alienation and so bound thereby.

According to Roman-Dutch law, minors cannot be considered bound by an alienation of immovable property during their minority, unless such alienation has not only been effected by a properly constituted guardian, but has also been sanctioned by the Court who are considered the supreme guardians of the interests of minors.

The circumstances of the present case raised the questions whether Synadabi, after her second marriage—and without having been specially appointed guardian of her minor children —properly represented the minor plaintiffs; and, secondly, whether the lease *in longum tempus* was equivalent to alienation and required sanction by the Court.

Leaving the question of guardianship alone, the Chief Justice —on the strength of another Transvaal decision in *Breytenbach* v. *Frankel and another*[1]—held that a lease *in longum tempus* was equivalent to alienation, and that as the Court had in the present case not been asked for their sanction, the contract—so far as the minor plaintiffs were concerned—must be considered null and void.

The decision of the Chief Justice is noticeable for the leading position which is attributed to the South African Courts in the development of modern Roman-Dutch law. As Roman-Dutch law has been retained in British Guiana in all matters regarding immovable property, the consideration of decisions in other

[1] (1913) T. S. 300.

Colonial Courts where Roman-Dutch law is the common law of the Colony is certainly much to be appreciated, as it must lead to continuity, which is so highly desirable in all legal development.

Status of Married Women.—*Yearwood* v. *Yard* relates to the position of a married woman in British Guiana and her ability to begin proceedings in a Court of law, a similar decision as *Ramdeen* v. *Soodhaya*.[1]

Mrs. Yearwood, whose husband was living in Barbados and had not been in the Colony for at least two years, brought an action against the defendant in the Petty Debt Court for damages for personal injuries sustained by her in November 1916. Mrs. Yearwood had started proceedings in her husband's name "as having been married in community of property to Dora E. Yearwood" (the plaintiff).

According to Roman-Dutch law a married woman cannot, as a rule, institute or defend an action in her own name, but requires the concurrence of her husband, unless the Court consents to give their authority to make good the defect of the husband's absence. Dalton J. held that the circumstances did not admit of his discretion being exercised in that way. In his judgment the learned judge pointed out the difference which had been created for women married since 1904 in British Guiana by s. 16 of the British Guiana Married Persons Ordinance, 1904, and the difference of the wording in that Ordinance compared with the words of s. 12 of the Married Women's Property Act, 1882.[2] The British Guiana Ordinance only applies to women married *after the coming into force* of the local Ordinance, while the English Act applies to all women "whether married before or after" 1882. (Mrs. Yearwood, having been married in community of property, had been married before 1904.)

[1] (1914) L.R. B.G. 17.

[2] 45 and 46 Vict. c. 75.

NOTES.

Weights and Measures in Jersey.—The Vicomte of Jersey, Mr. E. T. Nicolle, kindly supplies the following note:

"Jersey weights and measures were derived from Normandy and the jurisprudence surrounding them is therefore of Norman origin. From early Norman times the authority over weights and measures belonged to the Duke. This prerogative of the Duke was exercised by his 'Vicomtes,' and thus in Jersey both before and after the separation in 1204, this jurisdiction has been confided to the 'Vicomte' as chief Executive Officer of the Crown in the island. The 'Vicomte de Jersey' has thus the custody of the Jersey standards and is charged with the entire administration of weights and measures subject to an appeal to the Royal Court of Jersey. The various regulations relating to weights and measures had been embodied in the Jersey Code of 1771, but for a long time past it was generally recognised that the regulations were out of date and often difficult to put into execution, owing to the developments of modern trade and requirements. As far back as 1843 the British Government had expressed the opinion that it would be desirable to assimilate the standards of weights and measures in the Channel Islands to the Imperial standards, but nothing came of the suggestion. In June 1914, however, the Government again drew attention to the desirability of effecting the change, and in 1917 Guernsey adopted the English system. When during the war it became necessary to ration sugar (which was issued by the Government for local requirements by English weight) and it was thought that other necessaries of life would have to be similarly rationed, the States of Jersey realised the difficulties and confusion which would inevitably arise through two systems of standards being in use. The result was that the English system was adopted. The conversion has been carried out, notwithstanding the war conditions prevailing, with surprising facility. The Jersey pound was about $1\frac{3}{4}$ ounces

heavier than the English pound; a reduction of the weights was therefore easily effected and all brass and the larger iron weights were saved. The Jersey quart was, on the other hand, smaller than the Imperial quart, but in cases of copper measures it was found possible to alter them. The Jersey dry measure (the *cabot*) has not been altered. It would have been impossible to do so, as 'rentes' of corn, etc., are still paid in kind in the island.

"The Jersey standard weight was the 'Marc de Rouen,' which was the same as the 'Livre de la Vicomté d'Eu.' It contained 7561 grains as compared with 7,000 grains English standard.

"The Jersey standard measure of capacity is the *cabot*, called the 'Etalon ou étendard du Château,' because it was formerly kept in Mont Orgueil Castle. This *cabot* contains 10 pots or 20 Jersey quarts. The Jersey quart was in fact derived from the *cabot*. The *cabot* equals 4 gallons, 1 quart, 3 gills Imperial measure.

"Under the new legislation the 'Vicomte de Jersey' still retains the control of the Department of Weights and Measures, but whereas he formerly took the fees and part of the fines levied, as perquisites of his office, it is now provided that the fees will be paid over to the States' Treasury and the 'Vicomte' will receive compensation therefor from the States. The fines are equally divided between the Crown and the States. Further, the States have agreed to the appointment by the 'Vicomte' of an Inspector of Weights and Measures, who is to be the Vicomte's officer, but who will be paid by the States."

Trial without Jury in Criminal Cases in South Africa.—Lieut.-Colonel Tamplin, K.C., writes:

"In terms of an Act passed by the legislature of South Africa in 1917 trial by jury in criminal cases, while still retained, is nevertheless rendered optional, and the prosecution on the one hand and an accused person on the other have, each, the right of trial without a jury. In the case where the prosecution may consider it unlikely that a jury would convict, that a fair trial would not be obtained before a jury, the Law Officer shall state his opinion in writing to 'the Minister' and the facts upon which it is based, whereupon a special Criminal Court may be constituted, composed of at least two and not more than three judges of the Supreme Court. In a case where the accused may desire to dispense with a jury he is entitled, upon giving the notice prescribed, to be tried by a single

judge who, ' in his discretion,' may summon ' two officials to act as assessors in an advisory capacity as to questions of fact arising upon the trial.'

" At sessions held in Capetown last November trial without a jury was demanded by the accused who was indicted for murder. Accordingly, it fell to the lot of Mr. Justice E. J. Buchanan, a judge of great experience, and two assessors selected by him, not only to hear, but also to determine a case of first-rate importance. The trial occupied some days and, the case on both sides having been completed, his lordship without anything in the nature of a ' summing up ' proceeded to return his verdict, which was ' Not Guilty.'

" His lordship intimated that to deliver an elaborate judgment would be equivalent to the expression by a jury of all their reasons in support of their verdict. The verdict was in the following terms : ' The Court finds that the evidence in this case does not establish that the prisoner is guilty of the crime with which he is charged. Therefore the accused is entitled to have a verdict of " Not Guilty " and is therefore discharged.'

" The learned judge, subsequently addressing the Attorney-General, who, it may be observed, has ceased under the Union Government to hold ministerial rank, remarked that it was not for him (his lordship) to criticise the new Act which had been passed, but his opinion was that a man should not be placed on trial for his life before any single person, and if a Court was specially constituted to try any person it should be a Court of full responsibility. Here a judge might call his assessors, but the latter were only to assist and were not members of the Court entitled to give judgment.

" It will be observed from the foregoing that the conditions precedent to trial without a jury in criminal cases differ materially as regards the prosecution and the accused person. In the first case the Law Officer has to submit his reasons to ' the Minister ' before the special Court can be constituted, and the special Court must consist of two judges, and not more than three. In the case of the accused desiring to dispense with a jury he has only to intimate his wish, whereupon the trial follows before a single judge and two assessors, who act merely in an advisory capacity.

" It would seem that for some reason undisclosed the legislature has been more careful with regard to precautions in the case of the prosecution than in that of the accused, notwithstanding, (and

this may have actuated the defence in the present instance), a case involving knowledge of customs, localities, or of persons, may quite conceivably arise in which the verdict of a jury would be the best decision of a question in issue."

The Central Provinces.—"The Central Provinces of India, with their capital at Nagpore, were formed," writes Mr. C. E. Buckland, "in 1861, under powers given by a Parliamentary Statute of 1854, into a separate Administration under a Chief Commissioner, by detaching certain territories from the North-Western Provinces and uniting them to the districts which had lapsed to the British Power on the death, without heirs, of the Raja of Nagpore. Under an arrangement made in 1902 certain districts of Berar are administered by the Chief Commissioner of the Central Provinces. Together they contain about 100,000 square miles and fourteen millions of inhabitants. Such territories, while administered by the Chief Commissioner, are technically under the immediate authority of the Governor-General; practically the Chief Commissioner is the 'Local Government,' with powers scarcely distinguishable from those of Governors and Lieutenant-Governors.

"The volume known as the Central Provinces Code [1] does not include the General Acts of the Governor-General, which apply to the Central Provinces in common with other parts of British India. The Central Provinces Code is herein divided into three Parts: (I.) Certain Bengal Regulations and Acts of the Governor-General, declared by an Act of 1875 to be in force, as affected by later legislation; (II.) the Local (not the General) Acts of the Governor-General in force; and (III.) the Acts passed by the Central Provinces Legislative Council, which was established in November 1913. Certain backward portions of the Central Provinces are 'Scheduled Districts' under an Act of 1874: the Acts declared to be in force therein by a Notification of 1878, under the Scheduled Districts Act of 1874, are tabulated in a list in an Appendix to this volume.

"The new edition, which has just reached this country, states the law as on December 31, 1917."

War Taxation.—Mr. S. E. Minnis kindly supplies the following note upon two publications prepared last year by the Legislative Reference Division of the Library of Congress and printed at the Government Printing Office, Washington, for the use of the Com-

[1] Fourth Edition, 1918.

mittee of Ways and Means, which contain in compact form a considerable amount of information dealing with comparative tax legislation in various countries.

One comprises statements of the rates of tax in the United States, Great Britain, Canada, and France on (1) articles of ordinary consumption, (2) articles for pleasure, recreation and adornment, and (3) entertainments and clubs.

The other is entitled "War Taxation of Incomes, Excess Profits, and Luxuries in certain Foreign Countries." It commences with a synopsis of the Income Tax Acts of the United Kingdom. Then follows the text of the Income War Tax Act, 1917, of the Dominion of Canada, with the amendments made by an Act of 1918 incorporated. The 1917 Act imposed a normal tax at a flat rate (modified by the deduction of an exemption at the base) with a graduated super-tax, while the 1918 Act altered the basal exemption, increased the rates of the super-tax, and introduced a sur-tax based on the total amount of the taxpayer's income tax and super-tax. The general rate of the normal tax is 4 per cent., but this is modified by the fact that in the case of unmarried persons and widows and widowers without dependent children the first $1,000 is exempted and the next $500 is charged at 2 per cent., while in the case of other persons the first $2,000 is exempted, and the next $1,000 is charged at 2 per cent. The super-tax commences with 2 per cent. on the amount by which the income exceeds $6,000 and does not exceed $10,000, and rises to 50 per cent. of the amount by which the income exceeds $1,000,000. The sur-tax commences with 5 per cent. of the normal income tax and super-tax on income between $6,000 and $10,000, and rises to 35 per cent. of the normal tax and super-tax on incomes exceeding $200,000.

French Income Tax.—The next section of the publication gives a translation of the income tax laws in force in France on January 1, 1918. A law passed on July 15, 1914, introduced an income tax on total income from all sources. The tax is payable by individuals only, and not by companies, and it applies only to persons who have a regular place of residence in France, and not to non-residents who derive income from a source in France. The rate of this tax has been increased several times since the passing of the original law, the rates now in force under a law of June 29, 1918, being as follows:

Taxable income not exceeding 5,000 francs (£200)	1½ per cent.
Taxable income exceeding 5,000 francs (£200) and not exceeding 150,000 francs (£6,000)	1½ per cent. rising to 16 per cent. by ·01 per cent. for every 100 francs income above 5,000 francs.
Taxable income exceeding 150,000 francs (£6,000) and not exceeding 550,000 francs (£22,000)	16 per cent. rising to 20 per cent. by ·01 per cent. for every 1,000 francs income above 150,000 francs.
Taxable income exceeding 550,000 francs (£22,000)	20 per cent.

Family Responsibilities.—A special feature of this tax is the extent to which account is taken of the family responsibilities of the taxpayer. In arriving at the *taxable* income, the first £120 of every taxpayer's income is deducted, while a married taxpayer is allowed an additional deduction of £80. Then for dependants further deductions are allowed, £40 for each of the first five, and £60 for each additional dependant. When the tax has been computed on the basis of the income reduced by these allowances, further reductions for dependants are granted from the amount so computed. Thus if the taxable income exceeds £400, a reduction of 5 per cent. of the tax is made for one dependant, 10 per cent. for two, 20 per cent. for three, 30 per cent. for four, and so on, subject to the limits that the total reduction may not exceed one-half of the tax, and that the reduction must not exceed £80 for each dependant. If the taxable income is less than £400, 7½ per cent. of the tax is deducted for the first dependant, 15 per cent. for two, 30 per cent. for three, 45 per cent. for four, and so on, subject to the limit that the total deduction must not exceed three-fourths of the amount of the tax.

General Income Tax.—The reconstruction of the direct tax system, of which the introduction of the general income tax was one stage, was completed by a law of July 31, 1917. This law abolished as State taxes the old patente or business tax, the door and window tax, and the personnel-mobilier tax (a tax consisting of a sort of poll-tax combined with a tax on the rental value of the taxpayer's residence), and imposed a tax or rather group of taxes on different classes of income, viz. (1) industrial and commercial profits; (2) agricultural profits; (3) salaries, wages, pensions and annuities; (4) income from professions and from other occupations not falling under any of the preceding classes, and (5) interest from certain securities. This group of taxes, together with the older real

property taxes, the tax on income from marketable securities, and the mine tax, constitutes a schedular system of taxes covering the various sources of income, while the general income tax is superimposed as a super-tax on the *total* income of individuals. The rates vary in the different classes, thus, subject to certain abatements, industrial and commercial profits are charged at 4½ per cent. and agricultural profits, salaries, etc., and professional income at 3¾ per cent., while in the case of real property the rate is 5 per cent. on the net assessment. Except in the case of the tax on interest, dividends, etc., on securities, and the mine tax, an abatement in respect of dependants may be claimed.

Excess Profits Tax.—The next section of the compilation consists of a synopsis of Excess Profits Tax Laws of various countries, followed by the text of the laws of the United Kingdom, Canada, and France. Laws (or proposals) of the following countries are dealt with in the synopsis : Great Britain, Canada, Australia, New Zealand, Union of South Africa, British Guiana, France, Tunis, Italy, Russia, Japan, Germany, Austria, Hungary, Bulgaria, Netherlands, Denmark, Norway, Sweden, Spain and Switzerland. These taxes vary very widely in their character as well as in the rates charged. Thus in some cases, such as the Canadian Business Profits War Tax, pre-war profits do not enter into consideration at all, the tax being levied on the excess of profits over a certain percentage of the capital. In other cases (*e.g.* New Zealand in 1916 and Denmark) the tax deals with total incomes of individuals (with the exception of certain classes of income), as distinguished from profits of businesses. There are instances (*e.g.* Netherlands and Sweden) in which the scope of the tax is in principle restricted to increases resulting directly or indirectly from war conditions.

The last few pages of the brochure are devoted to the text of the law and regulations relating to the luxury tax in France, and to the luxury duty proposals in Clauses 11 to 13 of the United Kingdom Finance Bill, 1918.

Professor Westengard.—We desire to express our regret at the serious loss which Harvard University has sustained by the death of Professor Westengard. At the time of his death he was Bemis Professor of International Law. He contributed last year a valuable article to this Journal on the subject of American influence upon International Law. His eminence as an international lawyer

had been recognised by his appointment as a member of the Hague Permanent Arbitration Court. Of equal, if not greater importance, was his work as an administrator and diplomatist during the twelve years which he spent in Siam, where for the greater part of the time he was General Adviser to the Government.

The Ordinances of St. Lucia.—In the revision of 1889 a distinction was drawn between the general statute law of the Colony and its civil law and procedure. The revision recently completed seeks to carry that distinction a step further, and to separate civil, criminal, and commercial law, as three groups which have readily lent themselves to codification, from the uncodified mass of departmental and general Ordinances which, with their appropriate regulations, may fairly be termed administrative law. This method of arrangement served, at any rate, the useful purpose of reducing the number of Ordinances to be inserted in this edition and should render periodical revision less formidable in future.

Three volumes contain the Ordinances in force in St. Lucia on December 31, 1916, excluding temporary provisions and such as relate directly to civil, criminal, or commercial law. Each series is grouped under a separate class or title, in order to facilitate consolidation when opportunity arises. The chronological table and subject index are the work of Mr. J. Louis Devaux, of Lincoln's Inn, who has been mainly responsible for the completion of these volumes. The original scheme, as approved by the Secretary of State four years ago, contemplated the publication in six volumes of the Codes, Ordinances, and Regulations of St. Lucia. The first instalment is now complete in three volumes containing the Ordinances, the Commercial Code, and the Statutory Regulations.

Folk-lore.—The attention of members of the Society of Comparative Legislation may be directed to Sir James Frazer's compendious study of *Folk-lore in the Old Testament*; one of the objects of the Society being to record native customs, especially in their legal aspect. "Folklore," in the broadest sense of the word, writes the learned author, "may be said to embrace the whole body of a people's traditionary beliefs and customs, so far as these appear to be due to the collective action of the multitude and cannot be traced to the individual influence of great men." From that point of view, following in the steps of Bochart, John Spencer, and William Robertson Smith, Sir James Frazer has

applied the comparative method of study to the folk-lore of the ancient Hebrews. "The examination of a particular legend, custom, or law has in some cases gradually broadened out into a disquisition and almost into a treatise." The whole constitutes one of those exhaustive and authoritative studies which have made the writer famous among all students.

Ex-Service Settlement.—Mr. A. R. Uvedale Corbett, Hon. Secretary of the Empire Land Settlement Committee of the Royal Colonial Institute, writes with reference to Captain Warman's book, *The Soldier Colonists* (Chatto & Windus):

"Captain Warman has tackled the subject in earnest, basing the prospects of success on community settlement, and pointing out their many advantages with the aid of co-operation for safeguarding the settler. He fully appreciates the value of past comradeship in establishing the future of these group colonies, and therefore wisely advocates regimental settlements. He has a clear insight into the many difficulties which lie ahead, and which must be overcome to ensure success, and urges the immediate need of organisation and understanding between the Home and Overseas Governments in treating the matter from an empire point of view. Now that the great undertaking of demobilisation has started in earnest, it is to be hoped that a census is being taken of the men desiring to settle on the land, otherwise it will not be possible to discuss the subject in a satisfactory manner with the Overseas Governments.

"Farms have already been acquired in this country by the Overseas Governments in order to provide training centres for their troops during the months that must elapse before their return home. Cannot such centres be taken over by our Government as they become vacant, so that those of our men who wish to settle overseas may gain some farming experience pending preparation being made for them as outlined by Captain Warman?

"I have personally interviewed several hundred officers and men, and received numerous inquiries regarding land settlement, both for home and overseas, and can earnestly endorse Captain Warman's views as to the need for immediate action in treating the whole matter imperially. The Government of Queensland have already intimated to my Committee that they are prepared to set aside a million and a half acres of suitable land capable of

accommodating some 9,000 British ex-service men, provided the Imperial Government will advance a loan to establish the settlers and build a short railway line into the property. Here is something concrete, apart from other Government offers dealt with in Captain Warman's book.

"It should always be understood that the Overseas Governments, although anxious to obtain settlers, have no desire to entice men overseas to the detriment of the Mother Country. They fully appreciate the need for a large settlement policy at home, but wherever our men wish to settle within the Empire this war has proved that they are not lost to us, but only go to strengthen and build up the Empire. Let us therefore treat the matter imperially and follow up in practice the theories so admirably expounded by Captain Warman in his most valuable and instructive work."

Mine Taxation in the United States.—Under this title the University of Illinois have added to their series of Studies in the Social Sciences a volume by Dr. L. E. Young. Its purpose is "to assemble some of the available data regarding the history and the present methods of mine taxation, including the laws of the states, the regulations of tax officials, the rules and methods used in appraising mines for the purpose of taxation, and the statistics of taxes paid by different types of mines operating under the various state laws."

One short chapter is devoted to the Federal taxation of mines. During the Civil War a tonnage tax was imposed on coal, and mines came also under the income tax which was passed on August 6, 1861, was repealed and re-enacted in the following year, and lasted with modifications until 1871. Mining companies, like other companies, came under the Corporation Excise Tax of 1909, a charge on the business of corporations at the rate of 1 per cent. on the entire net income over $5,000. This tax was replaced by the income tax imposed in 1913, and amended in 1916 and 1917.

A sketch of the history of state taxation of mines, and a selection of the constitutional and statutory enactments bearing on the subject, are included in the book. The different methods of taxing mines, apart from corporation taxes or state income taxes, are set out in the summary prefixed to Chapter V. as follows: (*a*) general property tax, (*b*) a tax on the gross output or gross earnings in addition to a property tax on improvements, and in

some states on land; (*c*) a tax on net earnings, in addition to a property tax on improvements and in some states on land; (*d*) a tax on some percentage of the gross and of the net earnings in addition to a tax on improvements, and in some states on land. A tonnage tax has in the past been employed in several States. Chapter VIII. contains statistics of the amount of taxes paid by the mining industry and Chapter IX. deals with suggested taxation reforms.

International Intermediary Institute.—Early in 1918 the International Intermediary Institute was founded at the Hague "to supply information in the widest sense on all questions of international importance, not bearing a personal or secret character, either on international law, Dutch and foreign law and jurisprudence, or on economic and statistical data and commercial policy." It is an exclusively Dutch organisation with the Minister for Foreign Affairs at its head and includes among its members statesmen and scholars, besides leading men of commerce and industry. The Institute is prepared to place at the disposal of institutions and individuals gratuitously the material already in its possession, which will be increased by the work of a number of collaborators and the co-operation of the Netherlands Government.

Holographic Wills and their Dating.—The following article, bearing the initials of Professor Lorenzen of Yale University, is reprinted from the November number of the *Yale Law Journal*. The statements are fully supported by no less than six pages of footnotes containing references to authorities: "Belgium, France, Italy, Austria, and Germany permit this kind of testamentary disposition. Under our own rules of the conflict of laws, holographic wills executed by American soldiers or civilians in any of the above countries in conformity with the local law of the place of execution will be recognised in many of our states, even though the local legislation of the particular state does not sanction holographic wills executed at home. In the rest of the states such will may be regarded, under the *renvoi* doctrine, as valid to pass personal property, if the testator was domiciled in a state authorising the execution of wills in accordance with the *lex loci*, and may be regarded as valid to pass realty where the land is situated in such a state.

"A holographic will is the simplest form in which a written will may be expressed. As its name indicates (ὁλος = entirely; γραφειν =

to write), the will must be written in its entirety by the testator. Beyond this requirement nothing is essential for the validity of this will. Modern statutes, however, have frequently imposed the additional requirement that it shall be dated. In Spain, Porto Rico, the Philippine Islands, and Honduras it must be upon stamped paper corresponding to the year of its execution. In Japan the testator must affix his seal. In North Carolina and Tennessee the holographic will must be found among the valuable papers or effects of the testator or have been lodged by him with somebody for safe keeping.

" Holographic wills are of Roman origin. They were first authorised by the emperors Theodosius and Valentinian ; but all private testaments were prohibited by Justinian except in the case of testamentary dispositions by ascendants in favour of their descendants. The modern holographic will arose in the customary law of northern France. Through its recognition by the Code Napoléon it has influenced the law of other countries. Following the French example, holographic wills are now recognised in Austria, Belgium, Germany, Italy, Roumania, Spain, and Switzerland, in Scotland and in Quebec, in about one-third of the states of this country, Porto Rico, the Philippine Islands, a few of the Central and South American states, and in Japan. They are not valid in Denmark, Norway, Portugal, Russia, Sweden, nor in England and most of the states of North and South America.

" Notwithstanding the simplicity of its form, the holographic will has given rise to much litigation. It appears to be recognised generally that a will, written in its entirety by the testator and properly signed and dated, need not be clothed in any particular form. Not infrequently it has taken the form of a letter. There appears to be agreement likewise that it may be written with pencil or with any other instrument and that it may be expressed in any language known to the writer. As regards the date there are wide differences in the law of the different countries.

" Several decisions of the French Court of Cassation of recent date call attention to the importance of the date in a holographic will. In one of them the will, dated ' February 8, 1809,' was actually executed on February 8, 1909. In another case the date indicated was ' May 3, 1898,' the actual date of execution being February 3, 1909. In both cases the will was sustained, the Court holding that

the precise date of execution appeared with certainty from the contents of the will itself.

"In Austria, Arkansas, Arizona, Kentucky, Mississippi, North Carolina, Tennessee, Texas, Virginia, and West Virginia the date is not essential for the validity of a holographic will. In all other countries recognising holographic wills and in California, Idaho, Louisiana, Montana, North Dakota, and South Dakota the will is void as a holographic will unless dated. Differences exist concerning (1) the mode of indicating the date; (2) the permissibility of ante-dating or post-dating; and (3) the possibility of proving the will notwithstanding a defective or incomplete date.

"1. *Mode of indicating date.*—The civil codes of Italy, Spain, Porto Rico, the Philippines, and Honduras specifically require that the date shall indicate the day, month, and year. Such an indication is necessary also under the law of those countries and states whose codes or statutes provide merely that the holographic will must be dated. If either the year or month or day is omitted, the will is invalid. All are agreed also that an equivalent expression suffices, for example, 'New Year 1918,' 'Easter Sunday 1918.' The date must be entirely in the handwriting of the testator. If it is printed in part the will is invalid. The place of the date is immaterial. It may be in the beginning, in the middle, or at the end of the will and may follow the signature. It may be in the text, provided it is intended as a date. In France a holographic will not expressing any date has been sustained where the time of its execution appeared with certainty from the terms of the will.

"2. *Permissibility of ante-dating and post-dating.*—There is agreement on the Continent that if a wrong date is inserted with a fraudulent object, for example, to cover a lack of capacity, the will is void. Where the motive is innocent Belgium allows either an ante-dating or a post-dating. In case of post-dating the testator must survive the date inserted; otherwise the will is void. In France and Germany it is insisted that the requirement of a date in the nature of things implies the *true* date and that an ante-dating or post-dating necessarily renders the will void. Italy takes the same view, although there is a decision authorising a post-dating where the testator survived the date indicated. In this country the precise question has not come before the Courts.

"Suppose that a holographic will is written and signed but that the date is written on a subsequent day. Must the testator affix the latter date? According to the view of the German law the will is not deemed executed until the affixing of the date, that is, until all the formal requirements have been satisfied. The time when the date is written thus constitutes the true date. In France, on the other hand, the date must be affixed, it seems, at the latest when the signature is attached. The will cannot be dated later, and must therefore be re-written. The Supreme Court of California has held that the testator may adopt the earlier date.

"According to the law of some countries the incorrectness of the date can be established only by means of evidence furnished by the will itself. The proof is not so restricted in case of fraud, undue influence, or insanity.

"3. *Possibility of proving the will notwithstanding defective or incomplete date.*—The states that require the insertion of the true date avoid the will where the instrument is proved to have a wrong date, although the real date of execution can be ascertained with certainty from the will itself. They take this view notwithstanding the fact that the capacity of the testator is not challenged and there is no allegation of fraud, undue influence and the like.

"When a wrong or defective date is inserted through inadvertence the Courts of Belgium, France, Italy and Argentina take a more liberal view and sustain the will, if the true date can be determined with certainty from the will itself, that is, either from the facts appearing therein or from the watermark of the paper when the will is written upon stamped paper. The recent decisions of the French Court of Cassation, already mentioned, support the same doctrine. The proof is not so restricted in the United States.

"A stricter view has been maintained by the highest Court of Germany. An untrue date has been held to render a holographic will null and void without distinguishing between an intentional and accidental insertion of a wrong date. A recent case modifies this doctrine, at least to the extent of holding that where the wrong date is obviously a mistake, as where '1804' is written for the year '1904,' it may be corrected by proof furnished by the will itself.

"The rule governing erroneous dates is applied in Belgium, France, Italy, and Argentina, also where the date is incomplete. The

German law is doubtful. The American cases have not raised the precise point.

" The requirement of the date does not include the place of execution. Such place must be indicated under the law of Switzerland and Germany. In these countries a holographic will omitting the place of execution is void. The place of execution, too, must be in the handwriting of the testator ; if it is printed the will is void. If the will is executed *en route* between two places, for example, on a train from Paris to Rome, a statement to that effect is sufficient without mention of a particular place. The place of execution need not be mentioned in any particular part of the will. What has been said in this regard concerning the date applies also with respect to the place of execution."

Registration of Title to Land.—In a contribution to the *Yale Law Journal* (November 1918), Mr. J. E. Hogg answers the three questions (1) how does registration of title stand as a system among other systems of conveyancing and registration ? (2) what are the important points on which the various systems of registration of title differ among themselves ? and (3) what would be an ideal system and what prospect is there of its realisation. The legislation in the United States and the British Empire is examined in detail, and suggestions made for a scheme capable of general adoption.

Commissioners on Uniform Laws in Canada.—It has long been generally recognised that the independent action of the Canadian provincial legislatures has resulted in a diversity of legislation which, especially with regard to commercial law, raises a serious obstacle to commercial intercourse between different parts of the Dominion and is a source of embarrassment to British and foreign merchants doing business in Canada. In the United States, where a similar but perhaps more complicated situation exists, work of great value has been done by the National Conference of Commissioners on Uniform State Laws.[1] For the past twenty-seven years these commissioners have met annually and have drafted various uniform statutes, and the subsequent adoption by many of the state legislatures of these statutes has secured a substantial measure of uniformity on various subjects.

[1] For a description of the work of the commissioners see an article by a former President, Mr. Walter G. Smith, *Journ. Comp. Leg.* (1916), vol. xvi. p. 154.

The obvious benefits resulting from the meetings of the state commissioners in the United States suggested the advisability of similar action being taken in Canada, and on the recommendation of the Council of the Canadian Bar Association several of the provinces passed statutes [1] providing for the appointment of commissioners to attend a conference of commissioners from the different provinces for the purposes of promoting uniformity of legislation in the provinces.

A Conference of Commissioners on Uniformity of Laws has been organised to promote uniformity of law throughout Canada, or in those provinces where uniformity may be found practicable, by such means as may appear suitable to that end, and in particular by facilitating (1) the meeting of the commissioners of the different provinces in conference at least once a year, (2) the consideration by the commissioners of those branches of the law with regard to which it is desirable and practicable to secure uniformity of provincial legislation, and (3) the preparation by the commissioners of model statutes to be recommended for adoption by the provincial legislatures.

A committee of the Conference has been appointed to consider whether the Sale of Goods Act and the Partnership Act,[2] already adopted by the majority of the provinces,[3] should be recommended for adoption by the others.

Another committee has been appointed to prepare and submit to the commissioners a set of rules for legislative drafting and report upon the Interpretation Acts of the various provinces.

Committees, consisting each of three commissioners, have also been appointed to prepare and submit to the other commissioners model statutes on the following subjects: (1) Conditional sales, (2) bulk sales, (3) statutory conditions in fire insurance policies, (4) wills, (5) legitimation *per subsequens matrimonium.*

The appointment of commissioners does not bind any province to accept any conclusions arrived at by the Conference; and such uniformity of legislation as may be secured by the labours of the Conference will depend upon the subsequent voluntary acceptance

[1] British Columbia, 1918, c. 22; Manitoba, 1918, c. 99; New Brunswick, 1918, c. 5; Ontario, 1918, c. 20.

[2] See "Partnership Law in the Empire," by J. E. Hogg, (1918) *Journ. Comp. Leg.* vol. xviii. p. 232.

[3] Alberta, British Columbia, Manitoba, Nova Scotia, and Saskatchewan.

by the provincial legislatures of the recommendations of the Conference.

The above particulars are taken from the first report of the Conference, of which the President is Sir James Aikins, K.C.

English Settlements and Scottish Divorces.—Dr. Baty contributes the following note on the Scottish case of *Montgomery* v. *Zarifi*, affirmed recently by the House of Lords [1]:

"A domiciled Scotsman had married in England, and the parties had agreed by ante-nuptial settlement that the provisions of the settlement should be regulated as if the parties had been and remained for life domiciled in England. *The trustees were English, and in England.*

"The wife was divorced, and could only be divorced, in Scotland. What was to be done with the settlement moneys? The law of Scotland provides a definite mode of dealing with them in such a case. The law of England leaves it to the Court to make an arbitrary disposition; but of course, it is to the English Court and no other tribunal to which it leaves it. The funds were in England: the proceedings were in Scotland.

"Four alternatives therefore emerged for the Scots Court. First to apply the Scots law. A Scots wife was being divorced. Never mind by what law her marriage settlement was to be interpreted. The divorce overrides all that, and has no relation to the desires of the parties. The law steps in apart from their desires, and remoulds the disposition of their property. This is obviously the only course consistent with science and common sense. A decree made by the Court of the proper divorce forum would be anticipated by, and respected by, most civilised jurisdictions.

"The second alternative was to apply the English law. The parties had adopted it as far as they could; why not adopt it to decide not only the destination of the property whilst their agreement stood, but to decide its destination when that agreement was forcibly broken? The practical difficulty in the way was that this was impossible. If the parties had been domiciled in England, an English judge, accustomed to such matters, would have allocated the property on the accustomed lines. Being without jurisdiction in the matter, such a judge could not act. The third alternative was to invite the English Court to say what it would have done. It is extremely doubtful whether the English Court would have com-

[1] 1918, 2 Sc. L.T. 110; in *Dom. Proc.*, June 28, 1918.

plied : it is not a question of law, but of discretion, and the English judge could not exercise a discretion in a case which he had not heard.

" This last alternative commended itself to Lord Johnstone in the Court of Session, but to nobody else.

" The fourth alternative was to do nothing.

" The Court of Session and the House of Lords preferred this attitude of masterly inactivity, leaving the guilty wife to the full enjoyment of her possessions. Lord Finlay's reason was that the contract contained in the settlement must be supposed to contemplate the case of divorce, and to exclude altogether the application of the Scots law.

" Suppose it did. Although the parties may be able to contract themselves out of their rights—(as Sir F. Jeune very well put it in a different case)—they cannot contract the Court out of its duties. Could an agreement between domiciled English people that in case of divorce the rights of all parties under the marriage settlement should be governed by the law of France, so as to exclude the power of the Court to reform the settlement, for one moment hold water ? Could the parties contract that in case of divorce the settlement should not be subject to reform ? As long as divorce is regarded as a matter of public regulation, and not an affair of bargain which may be pre-matrimonially provided for, it is difficult to give any but a negative answer.

" It would seem, therefore, that the penal provisions of the Scottish law which divorced her, and which alone could divorce her, ought to have been applied to the property of this Scottish wife—and that, apart from any agreement by her husband that its destination should be regulated by English law.

" It will be noted that the doctrine of *renvoi* was not applied by Lord Finlay. It would have been a very mild resort to that doctrine to hold that ' English law ' included the English rule of private international law which refers divorce *a vinculo*, and all ancillary questions, to the determination of the Courts of the domicile.

" Lord Haldane's view is scarcely more acceptable. It comes to this, that English trustees will never be allowed or required to recognise a modification of the terms of their trust-duties arising from foreign law. Lord Haldane must know that a foreign curator is entitled to the chattels of his bankrupt in England—and there seems to be no reason for excepting trust property from the principle (*Dulaney* v. *Merry*, [1901] 1 K.B. 536).

" Lord Dunedin's position was perhaps the most defensible. Had the husband asked for the declaration in terms of the Scottish law *in the action of divorce*, Lord Dunedin thought he ought to have had it—and then, obviously, it would have been for the English Court to say whether or not he could practically get hold of the property in the hands of the English trustees. But his lordship insisted that the husband had not done this : he had claimed his alleged right in a new and independent action. It does not clearly appear why this is to make a difference.

" It will be seen that the case is no real authority for the proposition that ' the parties can contract the Court out of its duty.' The proposition it does support is that because a Scottish or foreign Court can have nothing to say to the disposition of property actually in the hands of domiciled English people—(for why trustees more than any others ?)—it should therefore refrain from making decrees about it. Plainly this is an unsustainable dogma—though whether the decrees will prove effective is always uncertain in such cases where the property is abroad.

" Any use of the case in future as an authority for anything must be rendered ineffective by the remarkable variance between the reasons given by the noble lords in support of their decision. If Lord Dunedin is right, the whole case turns on a microscopic point of procedure ; and it is submitted that it is best so to regard it."

Roman-Dutch Law in British Guiana.—Referring to Mr. Ledlie's article on the alteration of the law in British Guiana from Roman-Dutch to English (Journal, vol. xvii. p. 210), *Timehri*, the journal, of the Royal Agricultural and Commercial Society of British Guiana, observes " that the change has been effected without question and almost unnoticed. Although eighteen months have passed, no difficulties caused by it have occupied the attention of the Courts, and no amending legislation has been proposed."

Prevention of Unnecessary Litigation.—It is too often a well-founded reproach against the deliberations of professional or trade associations that they end only in useless generalities or in resolutions to maintain at all costs their privileges and defend their interests. In marked contrast to this attitude are the latest proceedings of the American Bar Association met to consider the question " How can the Bar best be organised for the prevention of unnecessary litigation, and thus increase popular respect for law and public confidence in the legal profession ? " No body of laymen could have been more

alive to the existence of evils, and none could give more practical advice than the Association's Committee. Some facts elicited in the course of the inquiry will surprise English, as they apparently surprised American, lawyers. The chairman of the Committee, stating the results of an examination of the character of cases before the Courts, said: "To my amazement, and the amazement of many others, the volume of litigation concerning wills seemed to exceed by far that on any other subject. Corporations came second, executors and administrators third, municipal corporations fourth, master and servant fifth, and contracts sixth"—proportions which would certainly not hold good in England. The chairman added that of the general volume of litigation concerning wills, 82 per cent. is of a preventable nature, while 73 per cent. concern the meaning and legal effect of the instrument, and less than 8 per cent. concern mental capacity, fraud, and undue influence. What an immense part the will played in litigation in ancient Rome, some of the titles of the Digest plainly manifest. Is there a repetition in the United States of the social circumstances which made the "testamentum" the subject of so much legal ingenuity on the part of the jurists of the Empire?

The Publishing and Printing of the Journal.—With the issue of the present number of the Journal a modification is made in the arrangement which has existed for twenty years. The name of Mr. John Murray, who has warmly supported and assisted the Journal, no longer appears upon the title-page. Separate numbers may now be obtained from 1, Elm Court, Temple, E.C.4. The distribution to subscribers will be undertaken by the printers, Messrs. Hazell, Watson & Viney, Ld., whose admirable work has earned the approbation of the members of the Society. The opportunity may be taken to express sympathy in the loss which has been sustained by the death on February 12 of the head of the firm, Mr. Walter Hazell. "A kindly social pioneer," said *The Times*, "a large-hearted citizen, a wise and generous 'captain of industry,' Walter Hazell will long be remembered with gratitude and respect." It should be added that the portraits which are a special feature of the Journal are the work of the Art Reproduction Co. All communications in reference to the distribution of the Journal as well as upon editorial matters should be addressed to the Hon. Secretary, 1, Elm Court, Temple, London, E.C.4.

NOTICES OF BOOKS.

EUROPEAN TREATIES OF THE NINETEENTH CENTURY.

In a book[1] containing the more important treaties which, from the close of the Napoleonic wars until the outbreak of the present war, have regulated the status and territory of the European States, Sir Augustus Oakes and Mr. Mowat have adopted a geographical arrangement. They deal with the Restoration of Europe at the Congress of Vienna, the independence of Greece, Belgium, Turkey, the Danish Duchies, the Union of Italy, Austria and Prussia, Luxembourg, the Franco-German War, the Balkan States, and the Triple Alliance. Each chapter begins with a short historical survey of the diplomatic field at the time, so far as it had a bearing upon the events which led up to the treaty, or group of treaties, with which the chapter concludes. The book is valuable, not only as a work of reference, but also to those who are studying the treaties for the first time, and to the international lawyer.

In the introduction, Sir Erle Richards discusses the effect of war upon treaties, and in their first chapter the authors describe the procedure at international conferences and the technical aspects of the conclusion of a treaty. Many of the subjects which are dealt with in the following pages of their work will be reconsidered in the settlement now about to be made. The appearance of this book is therefore timely.

THE BULWARKS OF PEACE.[2]

Any one who wishes to get a thorough understanding of the principles involved in the idea of "the League of Nations," the difficulties that have to be surmounted and the problems that have to be solved in giving effect to that idea, and the importance of the step it involves in the progress of the world, cannot do better than read Dr. Hart's book, *The Bulwarks of Peace.*

[1] *The Great European Treaties of the Nineteenth Century.* Edited by Sir Augustus Oakes and R. B. Mowat, with an introduction by Sir Erle Richards. (The Clarendon Press, Oxford.)

[2] *The Bulwarks of Peace.* By Heber Hart, K.C., LL.D. (Methuen & Co., Ltd. 3*s.* 6*d.* net.)

Concisely and lucidly written, it seems to take up every side of the subject and always to go straight to the kernel of the matter. In the breadth of its views, the ability with which it marshals facts, and the clearness and force of its reasoning the book is uniformly excellent.

There is a sufficient account of the history of international relations to show the place the League of Nations occupies in the evolution of human institutions, and a sufficient account of the past history of national law and government to show the parallelism which exists between national and international development and the guidance this affords towards the adoption of safe lines for international progress.

The meaning and significance of the ideas of sovereignty, freedom, equality, independence and interdependence of states, neutrality, federation, positive law, and public right are clearly set forth, and the relations between nations and states, freedom and law, right and might, are placed in their proper light.

It is satisfactory to find that, as the result of a thorough exploration of the subject, Dr. Hart comes to conclusions in favour of the desirability and the practicability of a League of Nations under which a full alternative to war would be provided, so that every claim of one state against another would be settled without war, although at the same time room would be found for progressive international change, even in such matters as accession of territory and adjustment of frontiers. A well-drafted series of " essential conditions " for the constitution of such a League is set forth.

F. N. Keen.

INTERNATIONAL LAW.

A book[1] which had already attained the reputation of a brilliant essay on the whole subject of international law from the practical standpoint by one of our most able advocates has a peculiar personal interest connected with the present edition in the fact that its author had reached the highest official position at the Bar, while in the short time which has elapsed since its publication he has become the head of the British Judicature. This edition has also the great advantage of being able to utilise the experience of the greatest war in history, during a considerable part of which, as Attorney-General, the author was responsible for the legal correctness of the actions of the Imperial Government, and in addition the valuable aid of Dr. Phillipson, whose studies of the subject, whether generally or in special questions, in addition to editing such classics

[1] *International Law.* By the Right Hon. Sir F. E. Smith, Bart., K.C., M.P. Fifth Edition, revised and enlarged by Coleman Phillipson, LL.D., Litt. D. (London and Toronto, 1918, 456 pp.)

as Wheaton, render him specially qualified to collaborate in such a work. The result of this combination of authorship and editorship is a concise compendium of the theory and practice of the subject following clear general lines of thought and arrangement, emphasised by frequent references to the new developments during the Great War. One may be permitted to criticise, in the opening description of the sources of international law, the limitation of the authority of the opinions of jurists to their mere answers to officially put questions, seeing the enormous debt the whole fabric of the science owes to the academical opinions of individual and associated jurists; and in the definition of international persons, the absolute confinement of the term to States seems incompatible with the present demand for the punishment of belligerent individuals as international criminals.

Similarly in the part dealing with the position of States in time of peace, and in the account of the grounds of intervention, the author's rejection of the claims of humanity are not in accordance with modern practice and is not likely to be accepted in the international law of the immediate future. In an organic science reflecting the progressive opinions of the civilised world it is impossible to rule out as unorthodox the demands of new conceptions to recognition. One may, *per contra*, call attention to the merits of the discussion of the independence of States; the rights over the airspace, which the authors point out are not analogous to those over the sea; the classification of treaties and the limitations on their permanence implied in the phrase *rebus sic stantibus*; the history of the Arbitration movement and the Hague Peace Conferences with their provisions for the pacific settlement of international disputes, the Permanent Court and the projected Judicial Arbitration Court for questions of a purely legal or juridical nature. The third part dealing with belligerency gives a careful statement of this branch of the subject, which must inevitably still receive most attention at the present time, and the special points which the recent war has brought into such terrible relief, *e.g.* the effect of war on persons, especially enemy persons and their property, the distinction between combatants and non-combatants, and the scope of hostilities and the limits of permissible violence, the claim of military necessity to override the accepted laws of war, compulsion of the civil population, sieges and bombardments, ransom and contributions, requisitions, the use of barbarous methods of warfare, the treatment of prisoners, sick and wounded, or shipwrecked persons in neutral ships, hospital ships, and armistices.

The fourth part deals with the branch of the subject which has perhaps been the most earnestly considered one in the war, neutrality and its attributes, which the author says "differs from other branches of international law in the comparative certainty with which its rules may be stated, its essential significance lying in the negative attitude of holding

aloof and not in the positive attitude of offering impartial treatment to the adversaries." One may, however, take leave to doubt whether neutrality is not likely to be essentially modified as a result of the Great War, more perhaps than any other department of the subject, even if the projected League of Nations does not alter its whole scope and character.

The impression left by the perusal of the present edition may be summed up by saying that it will contribute a valuable and up-to-date practical guide to the science of international relations which will be entering on a new phase after the recent upheaval has subsided.

G. G. P.

A FORERUNNER OF INTERNATIONAL LAW.[1]

THE latest addition to the series of Classics of International Law published by the Carnegie Endowment is the work of Legnano. The Doctor of Bologna whose *floruit* was 1350 is appropriately given to the world by the Doctor of Bologna who in the year 1919 has placed us more than ever in his debt by his learned labours on this work.

"The author," as Dr. Holland points out in his introduction, "was far from sharing in the clean-cut views upon the scope and nature of the 'laws of war' to which international jurists, after more than five centuries of subsequent discussion, have at length attained." And not unnaturally. For if we take our stand at the time when Legnano wrote, it will be seen from what a completely different angle the mediæval mind looked at these things. The basic condition of international law as we understand it—the presupposition of independent and sovereign states—was absent.

The Emperor was the lawful superior of the States within the Empire, and this "lesser light" was in subordination to the greater light of the Papacy. The form of society was still the feudal pyramid; baron went to war with baron, and private rights were still often enforced by individual rather than by juridical sanction. Hence it is that there is comparatively little in Legnano's treatise which deals with the law of war properly so called, that is, the rules which regulate the conduct in war of two or more independent States. To Legnano war is the application of force to disputes both within and without the State; it is "a contention arising by reason of something discordant offered to human desire, tending to exclude the discordance." This is the *stirps* from which branch off "universal corporeal war" (the rough equivalent of what we understand by war) and "particular" corporeal war, or the law relating to self-defence. Reprisals, in this treatise, mean the exercise of the right of self-help by a citizen

[1] *Giovanni da Legnano: Tractatus de Bello, de Represaliis, et de Duello.* Edited, for the Carnegie Endowment, by T. E. Holland. (Oxford, 1917.)

of one State as against the citizen of another when justice has been denied him. To this we will return, for in it we may see the germ of our "conflict of laws" or private international law. War proper, which is assumed to be always just or lawful war, is in accordance with divine law, for it tends to the punishment of guilt and the righting of injustice. Much of the title on universal corporeal war is taken up with discussion of branches of law which would more properly fall under the head of military law, *i.e.* that law which a State lays down for the government of its soldiers and their conduct in the field. Legnano's propositions on breaches of military discipline and their punishment are largely in anticipation of modern military codes, and his division of offences committed by soldiers into common and special offences (*i.e.* offences against the general law of the land and offences against the special code into which the soldier has contracted himself) is sound law to the present day. But the moralist follows fast upon the heels of the lawyer, for the title branches off into a discussion of the nature of fortitude and its place in war. In the parts of the treatise dealing with "particular war," or the right of self-help or self-defence, the difference between the mediæval and the modern treatment is even more pronounced.

With respect to "reprisals," Legnano is speaking for the most part a strangely familiar language. "When the remedies of positive law fail," he says, "it has been necessary to resort to this device of a declaration of war lest justice should perish." Reprisals are derived from a grant made to the wronged person or persons by the head of the State to which he or they belong for the exercise of force against the State which has denied them justice. It is thus, in effect, a declaration of war by one State against another in order to redress a wrong done to one of its citizens. "The material cause from which reprisals arise is a failure of jurisdiction," says Legnano, and in this and the following passages he states all the law there is on the subject, and all the wise and learned who have come after him have not added anything. From the definition it follows that the failure of jurisdiction is the condition precedent for the exercise of reprisals. If the judge of first instance fails to do justice, the injured man should appeal to the next higher Court, if there be one, and if he is again frustrated, he will have no further remedy, for there has been no failure of jurisdiction. But if there has been an exercise of jurisdiction, but so tainted with fraud or favour that it has been in effect a failure of jurisdiction, then the injured party may resort to the remedy of reprisals. The whole of this title is a model of legal exposition, and its conclusions are as valid in the twentieth as they were in the fourteenth century.

Legnano describes his work as a treatise. But it rather suggests lecture notes for his classes. His method is the modern method of exposition by concrete cases. He begins by posing his question, whether, let

us say, the property of an ambassador can be the object of reprisals. He then goes on with an *apparet*—an elaborate building up of all the most plausible arguments and fallacies leading to the wrong conclusion—and finally passes on to his *solutio*, in which the correct legal answer is given and the reasons explained. He is characteristically mediæval in the choice of his authorities, and freely supports his propositions with quotations from the Scriptures, the civil and the canon law, and the ecclesiastical writers. Legnano will more than repay time spent upon him by the international lawyer.

CYRIL M. PICCIOTTO.

FOREIGN CORPORATIONS IN AMERICAN LAW.

MR. HENDERSON[1] has done for American law what had before been done for the laws of most highly civilised countries and should be done for all. He has given his legal fellow-countrymen the means of bringing their law of foreign corporations into relation with the thought and practice of other countries. Nothing is worse for the development of sound principles of private international law than a provincial atmosphere: nothing can be better for it than to be made to travel abroad in mind by such books as Mr. Henderson's, which view and review the tendencies of the local law in the light of other tendencies abroad.

Mr. Henderson tells us how the public law of foreign corporations in America has gradually evolved from the extreme restrictive theory towards the doctrine of compulsory recognition. A merit of his work is that he does not regard this process, as would some continental lawyers, as a process of spiritual illumination. He traces its historical development and points out the facts and events which made it necessary and obvious that the change should come with the development of civilisation. Mr. Henderson ranges himself definitely with those who welcome the change as good business and good jurisprudence. Chief Justice Taney's American version of the restrictive system "has not," he says, "made for justice; for as applied to modern industrial conditions it runs contrary to the whole spirit of [the American] constitutional system." For the rest, Mr. Henderson, looking at the matter from his American point of view, does not perhaps quite appreciate how little comfort that blessed word "comity" can give to European lawyers —which has given in this connection so much comfort to those of the United States. Those who have accustomed themselves to the almost metaphysical speculations of the French and Italian schools about the position of foreign corporations will never be able to satisfy themselves

[1] *Foreign Corporations in American Law.* By Gerard Carl Henderson, A.B. LL.B. (Harvard University Press.)

that so mild and genial a thing as comity can enable even the most friendly judge to contemplate as existing that which is non-existent. But with Mr. Henderson, as with most other lawyers of the Anglo-Saxon or common-sensible school, it all comes right in the end ; and he is prepared to maintain, in spite of metaphysics, comity, and the rest, that a corporation can in fact exist in the territories of States other than that from which it received its first incorporation. He adopts also the now almost universally accepted opinion that a corporation must be looked upon as domiciled at the place—even though it be a foreign place—at which it has its *siége sociale*.

Mr. Henderson's book is written with wide knowledge and mature reflection. The region that he explores is a dry one: our gratitude is the greater to him for making us a road therein.

E. H. Y.

BRITISH COLONIAL POLICY.[1]

Professor Berriedale Keith has made a selection of speeches and documents from which—as it were, from "leading cases"—the colonial policy of Great Britain may be gathered. Two of the documents, the Declaration of Independence of the United States, July 4, 1776, and the resolutions of the Economic Conference of the Allies, Paris, June 1916, can hardly be regarded as being directly connected with the main subject, but both of them are papers of first-rate importance, and the former, at any rate, summarises the errors of George III.'s treatment of the Colonies, a clear warning of a policy to be avoided. The cases illustrated by the selections are—The Origin of Representative Government in Canada, the Deadlock in Canada and the Grant of Responsible Government, Responsible Government in Australasia, the Federation of Canada, the Commonwealth of Australia, the Union of South Africa, the Autonomy in Internal Affairs of the Self-governing Dominions, the Relations of the Dominions to Foreign Powers, the Unity of the Empire. In addressing the Imperial Conference of 1911 Mr. Asquith alluded to the abandoned solutions (of the Victorian Era) of the "Colonial Problem"—the opposite policies of centralisation and disintegration ("hivings off," he termed it)—and dwelt on the value of elasticity and flexibility in our Imperial organisation. On another occasion (February 12, 1914) Mr. (now Lord) Harcourt referred to the well-worn platitude "that the Empire is held together by a silken cord. Beware lest you twist the cord into a whip-lash, for the crack of the lash would be the

[1] *Selected Speeches and Documents on British Colonial Policy*, 1763–1917 Edited by Arthur Berriedale Keith, D.C.L., D.Litt. 2 vols. (Humphrey Milford, Oxford University Press, 1918. 2*s*. each vol.)

knell of your Empire." The present state of the matter is that, in theory, the Dominions are, as General Smuts pointed out in 1917, subject provinces of Great Britain, but, in practice, they aim at a much higher position, to be recognised, in fact, as autonomous nations, as equal nations of the Empire, with a claim to be consulted on questions of foreign policy and Imperial interests. The problem of the time is, how, by Imperial Conferences, or Councils, or Federation, or a Commonwealth, to consolidate the Dominions, Colonies, and Protectorates into a unified Empire. The war has proved the loyalty of the Family of Nations and of the Dependency of India to the Mother Country. It remains for the political instinct of our race to arrive by conciliatory discussion at a determination of the problem. This collection of speeches and documents indicates, in a handy shape, without formulating, the various considerations, not to say difficulties, which the highest statesmanship has to encounter.

C. E. BUCKLAND.

We have also received the following:

Annual Report of the Smithsonian Institution, 1915, The Veto Power of the Governor of Illinois, by Niels H. Debel, Ph.D. [University of Illinois Studies in the Social Sciences], American Political Science Review, Bombay Law Reports, Bulletin de la Société de Legislation Comparée, Bulletin de l'Office International du Travail, Calcutta Weekly Notes, Canadian Reports of Exchequer Court, Canadian Law Times, Edinburgh Review, Harvard Law Review, Hindustan Review, International Law Notes, Juridical Review, Kathiawar Law Reports, Law Quarterly Review, Madras Law Journal, Natal Law Reports, New South Wales State Reports, Punjab Law Reports, Quebec Reports, Round Table, South African Law Journal.

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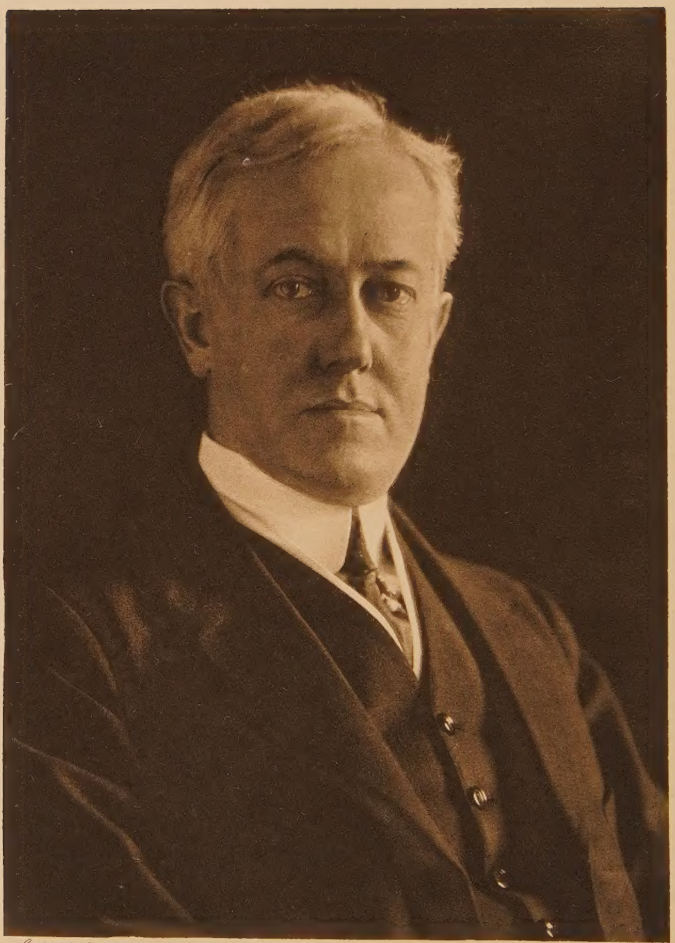

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The Hon. J. W. Davis
Ambassador of the United States.

The Hon. J. W. Foster
Ambassador of the United States